DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-8561
Vide 12-8505
Title: Doyle Randall Paroline, Petitioner
v.
United States, et al.
Docketed: February 5, 2013
Linked with 13A612
Lower Ct: United States Court of Appeals for the Fifth Circuit
Case Nos.: (09-41238, 09-41254)
Decision Date: November 19, 2012
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Jan 31 2013	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due March 7, 2013)
Feb 27 2013	Order extending time to file response to petition to and including April 8, 2013.
Mar 20 2013	Order further extending time to file response to petition to and including May 8, 2013, for all respondents.
Apr 24 2013	Response to petition from respondent Amy filed. (Printed Brief)
May 8 2013	Brief of respondent United States in opposition filed. VIDED.
May 8 2013	Supplemental brief of respondent Michael Wright filed. VIDED.
May 15 2013	Letter of May 15, 2013, from Solicitor General received. (VIDED)
May 20 2013	Reply of respondent Michael Wright filed. VIDED. (Distributed)
May 20 2013	Reply of petitioner Doyle Randall Paroline filed. (Distributed)
May 21 2013	DISTRIBUTED for Conference of June 6, 2013.
Jun 10 2013	The motion of petitioner for leave to proceed in forma pauperis is denied. Petitioner is allowed until July 1, 2013, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.
Jun 10 2013	Motion for reconsideration of order denying leave to proceed in forma pauperis filed by petitioner.
Jun 17 2013	DISTRIBUTED for Conference of June 20, 2013.
Jun 24 2013	Motion for reconsideration of order denying leave to proceed in forma pauperis filed by petitioner GRANTED. The order entered June 10, 2013, is vacated.
Jun 25 2013	DISTRIBUTED for Conference of June 26, 2013.
Jun 27 2013	Motion to proceed in forma pauperis is granted. The petition for a writ of certiorari GRANTED limited to the following question: What, if any, causal relationship or nexus between the defendant's conduct and the victim's harm or

	damages must the government or the victim establish in order to recover restitution under 18 U.S.C. Sec. 2259?.
Jul 19 2013	Motion to appoint counsel filed by petitioner Doyle Randall Paroline.
Jul 24 2013	Motion DISTRIBUTED for Conference of September 30, 2013.
Jul 26 2013	The time to file the joint appendix and petitioner's brief on the merits is extended to and including August 19, 2013.
Jul 26 2013	The time to file respondent United State's brief on the merits is extended to and including September 27, 2013.
Jul 26 2013	The time to file respondent Amy's brief on the merits is extended to and including November 13, 2013.
Aug 19 2013	Brief of respondent Michael Wright in support of petitioner filed.
Aug 19 2013	Joint appendix filed. (Two Volumes) (Statement of costs filed)
Aug 19 2013	Brief of petitioner Doyle Randall Paroline filed.
Sep 3 2013	Consent to the filing of amicus curiae briefs in support of either party or neither party received from counsel for respondent Amy.
Sep 5 2013	Letter from counsel for Amy and Michael Wright received.
Sep 6 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for respondent Wright.
Sep 6 2013	Consent to the filing of amicus curiae briefs in support of either party, or neither party, received from counsel for petitioner.
Sep 6 2013	Consent to the filing of amicus curiae briefs, in support of either party or neither party, received from counsel for respondent United States.
Sep 27 2013	Brief of respondent United States filed.
Oct 7 2013	Motion to appoint counsel filed by petitioner GRANTED. Stanley G. Schneider, Esquire, of Houston, Texas, is appointed to serve as counsel for the petitioner in this case.
Nov 4 2013	SET FOR ARGUMENT ON Wednesday, January 22, 2014.
Nov 5 2013	CIRCULATED
Nov 13 2013	Brief of respondent Amy Unknown filed (Reprinted). (Distributed)
Nov 19 2013	Brief amicus curiae of American Professional Society on the Abuse of Children filed. (Distributed)
Nov 19 2013	Brief amici curiae of National Crime Victim Bar Association, et al. filed. (Distributed)
Nov 19 2013	Brief amici curiae of Women's and Children's Advocacy Project, and Justice for Children filed. (Distributed)
Nov 19 2013	Brief amicus curiae of Mothers Against Drunk Driving filed. (Distributed)
Nov 19 2013	Motion for leave to file amici brief out of time filed by Professors Adam Lamparello and Charles McClean in support of neither party. (Distributed).
Nov 20 2013	Brief amicus curiae of National District Attorneys Association filed. (Distributed)
Nov 20 2013	Brief amicus curiae of National Center for Missing and Exploited Children filed. (Distributed)
Nov 20 2013	Brief amici curiae of "Vicky" and "Andy" filed. (Distributed)
Nov 20 2013	Brief amicus curiae of ECPAT International filed. (Distributed)
Nov 20 2013	Brief amici curiae of Domestic Violence Legal Empowerment and Appeals Project, et al. filed. (Distributed)
Nov 20 2013	Brief amici curiae of United States Senators Orrin G. Hatch, et al. filed.

(Distributed)

Nov 20 2013 Brief amicus curiae of Dutch National Rapporteur on Trafficking in Human Beings and Sexual Violence Against Children filed. (Distributed)

Nov 20 2013 Brief amicus curiae of National Association to Protect Children filed. (Distributed)

Nov 20 2013 Brief amici curiae of Washington, et al. filed. (Distributed)

Nov 20 2013 Brief amici curiae of National Crime Victim Law Institute, et al. filed. (Distributed)

Nov 21 2013 Motion for divided argument filed by respondent United States.

Dec 9 2013 Motion for divided argument filed by respondent GRANTED.

Dec 9 2013 Motion for leave to file amici brief filed by Professors Adam Lamparello, and Charles McClean in support of neither party out of time DENIED.

Dec 12 2013 Reply of petitioner Doyle Randall Paroline filed. (Distributed)

Dec 13 2013 Application (13A612) to extend the time to file the reply brief on the merits of the United States from December 13, 2013 to December 18, 2013, submitted to Justice Scalia.

Dec 13 2013 Application (13A612) granted by Justice Scalia extending the time to file until December 18, 2013.

Dec 18 2013 Reply of respondent United States filed. (Distributed)

Dec 18 2013 Proposal from the Solicitor General to lodge copies of a spreadsheet referenced in their reply brief on the merits.

Dec 19 2013 Record received from U.S.C.A. 5th Circuit. The record is electronic and located on PACER.

Dec 23 2013 Lodging proposal approved.

Dec 23 2013 20 copies of a spreadsheet lodged by the Solicitor General.

Jan 22 2014 Argued. For petitioner: Stanley G. Schneider, Houston, Tex. For respondent United States in support of petitioner: Michael R. Dreeben, Deputy Solicitor General, Department of Justice, D. C. For respondent Amy: Paul G. Cassell, Salt Lake City, Utah.

Jan 29 2014 Letter from counsel for the petitioner filed. (Distributed)

Feb 11 2014 Motion to file a supplemental brief after argument filed by respondent Amy Unknown.

Feb 19 2014 Response of United States to respondent Amy Unknown's motion to file a supplemental brief after argument.

Feb 21 2014 Motion to file a supplemental brief after argument filed by respondent Amy Unknown GRANTED. The other parties may file supplemental briefs, not to exceed 3,000 words each, addressing the effect of our decision in Burrage v. United States, 571 U.S. __ (2014), on this case, on or before Friday, March 7, 2014

Mar 7 2014 Supplemental brief of respondent United States filed. (Distributed)

Mar 7 2014 Supplemental brief of petitioner Doyle Randall Paroline filed. (Distributed)

Apr 23 2014 Judgment VACATED and case REMANDED. Kennedy, J., delivered the opinion of the Court, in which Ginsburg, Breyer, Alito, and Kagan, JJ., joined. Roberts, C. J., filed a dissenting opinion, in which Scalia and Thomas, JJ., joined. Sotomayor, J., filed a dissenting opinion.

PETITION FOR WRIT OF CERTIORARI

12-8561

ORIGINAL

NO. _____

Supreme Court, U.S.
FILED
JAN 31 2013
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IN THE
SUPREME COURT OF THE UNITED STATES

DOYLE RANDALL PAROLINE	§	PETITIONER
	§	
VS.	§	
	§	
THE UNITED STATES OF AMERICA	§	RESPONDENTS
and	§	
AMY UNKNOWN	§	

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPEAL CAUSE NO. 09-41238
IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CAUSE NOS. 09-41238 AND 09-41254
IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF TEXAS

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QUESTIONS PRESENTED

The Fifth Circuit held, contrary to the holdings of every other circuit considering the question, that there was no requirement that restitution be limited to losses proximately caused by the defendant's criminal acts and that the defendant is responsible for restitution for all losses suffered by the victim regardless of whether the Defendant's criminal acts proximately caused the loss and the victim's losses occurred prior to the Defendant's indictment and arrest.

1. In determining restitution in child pornography cases pursuant to 18 U.S.C. § 2259(b)(3), is the award of restitution limited to losses proximately caused by the defendant's criminal actions or may a defendant be required to pay restitution for *all* losses, regardless of whether his criminal acts proximately caused the loss?

2. Whether the Government is correct in its argument that authorizing $3.4 million in restitution against a defendant to a victim of child pornography who has never had contact with the defendant may violate the Eighth Amendment ban on excessive fines in the absence of a proximate cause requirement in the setting of the amount of restitution assessed against that defendant.[1]

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[1]Paroline also argued in the District Court and the Fifth Circuit that an award of restitution without a showing of proximate cause would violate the Eighth Amendment of the United States Constitution. The majority en banc opinion of the Fifth Circuit did not address Paroline's Eighth Amendments concerns.

PARTIES TO THE PROCEEDINGS

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TO THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

COMES NOW DOYLE RANDALL PAROLINE, Petitioner herein, by and through his attorneys, **STANLEY G. SCHNEIDER, F.R. "BUCK" FILES and TOM MORAN,** and pursuant to SUP. CT. R. 14 files this petition for writ of certiorari and in support thereof, would show the Court as follows:

I. STATEMENT OF JURISDICTION

This is an appeal from the *en banc* Court of Appeals for the Fifth Circuit. The Court of Appeals issued an opinion on rehearing from its earlier opinion on rehearing *en banc* on November 119, 2012.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3771(d)(3). The district court had jurisdiction pursuant to 18 U.S.C. § 3231.

II. CITATION TO LOWER COURT OPINIONS

The Fifth Circuit issued four opinions, two *en banc* and two panel. They are (in reverse chronological order):

1. *In re Amy Unknown*, No. 09-41238 (5th Circuit November 19, 2012) (*en banc*) (opinion on rehearing) (not yet reported), included in the Appendix as Appendix A.

2. *In re Amy Unknown*, 697 F. 3d 306 (5th Cir. 2012) (*en banc*), the initial opinion on rehearing *en banc*. A copy of the opinion is included as Appendix B.

3. *In re Amy Unknown*, 636 F. 3d 190 (5th Cir. 2011) (opinion on panel rehearing). A copy is included in the Appendix as Appendix C.

4. *In re Amy Unknown*, 591 F. 3d 792 (5th Cir. 2009) (initial panel opinion). A copy is

included in the Appendix as Appendix D.

The District Court issued a memorandum and opinion. *United States v. Paroline*, 672 F. Supp. 2 781 (W.D. Tex. 2009). A copy is included in the Appendix as Appendix E.

III. STATUTORY PROVISION INVOLVED

A. U.S. CONST. amend. VIII

Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishment inflicted.

B. 18 U.S.C. § 2259 Mandatory Restitution

(a) In general. – Notwithstanding section 3663 or 3663A, and in addition to any other civil or criminal penalty authorized by law, the court shall order restitution for any offense under this chapter.

(b) Scope and nature of the order. –

(1) Directions. – The order of restitution under this section shall direct the defendant to pay the victim (through the appropriate court mechanism) the full amount of the victim's losses as determined by the court pursuant to paragraph (2).

(2) Enforcement. – An order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A.

(3) Definition. – For the purposes of this subsection, the term "full amount of the victim's losses" includes any costs incurred by the victim for –

(A) medical services relating to physical, psychiatric or psychological care;

(B) physical and occupational therapy or rehabilitation;

(C) necessary transportation, temporary housing and child care expenses;

(D) lost income;

(E) attorney's fees, as well as other costs incurred; and

(F) any other losses suffered by the victim as a proximate result of the offense.

(4) Order mandatory. – **(A)** The issuance of a restitution order under this section is mandatory.

(B) A court may not decline to issue an order under this section because of

(i) the economic circumstances of the defendant; or

(ii) the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other sources.

(c) Definition. – For purposes of this section, the term "victim" means the individual harmed as a result of a commission of a crime under this chapter, including, in the case of a victim who is under 18 years of age, incompetent, incapacitated or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, but in no event shall the defendant be names as such representative or guardian

IV. STATEMENT OF THE CASE

It is undisputed that Amy was terribly sexually abused by a relative who placed pictures of the abuse on the internet. It is undisputed that Paroline possessed two of those photographs on his computer.

The issues presented boil down to a simple question: When a person commits the crime of possession of child pornography, is restitution for that crime limited to the harm committed by the crime of conviction or does § 2259 require restitution for all related crimes – including harm caused

by the original sexual abuse?

This case presents an unusual circumstance in which Petitioner and the Government take nearly identical positions that § 2259 has a proximate cause requirement for calculation of restitution while Amy and the *en banc* Fifth Circuit rejects those positions.

In its *en banc* opinion, the Fifth Circuit held § 2259 requires a restitution order for the full amount of the victim's losses regardless of whether the defendant's actions were the proximate cause of the losses. This includes losses caused by the original sexual abuse. The dissent would have held that while restitution was mandatory, it should be only for the losses proximately caused by the defendant's criminal acts.

This Court should grant review pursuant to SUP. CT. R. 10(a) in that the decision of the court of appeals conflicts with

1. *United States v. Aumais*, 656 F.3d 147 (2nd Cir. 2011);

2. *United States v. Monzel*, 641 F.3d 528 (D.C. Cir.), *cert denied sub. nom. Amy, Victim in Child Pornography Series v. Monzel*, _ U.S. _, 132 S. Ct. 756 (2011);

3. *United States v. Evers*, 669 F.3d 645 (6th Cir. 2012);

4. *United States v. Burgess*, 684 F.3d 445 (4th Cir. 2012);

5. *United States v. Kearney*, 672 F.3d 81 (1st Cir. 2012);

6. *United States v. McGarity*, 669 F.3d 1218 (11th Cir. 2012);

7. *United States v. McDaniel*, 631 F.3d 1204 (11th Cir. 2011);

8. And, *United States v. Laney*, 189 F.3d 954 (9th Cir. 1999).

The Court also should grant review pursuant to SUP. CT. R. 10(c) in that the court of appeals decided an important question of federal law which has not been, but should be, settled by this Court.

A. Overview of the Case

Paroline pled guilty to possession of child pornography and admitted to possessing 150-300 images of child pornography. Of those images, two were identified as images of Amy Unknown which he obtained over the internet. Paroline was sentenced to 24 months incarceration followed by supervised release. Respondent Amy Unknown filed a victim impact statement and sought restitution of approximately $3,367,854. Amy was sexually exploited by her uncle when she was eight and nine years of age. She is now 19 years of age. The pornographic images of her abuse depict rape, cunnilingus, fellatio, and digital penetration. These images have been, and continue to be, traded and distributed on the Internet. 672 F.Supp. 2d., at 783 and n. 3.

The district court found § 2259 contains a proximate cause requirement for all restitution and held that neither Amy nor the Government provided proof of the amount of the injury caused by Paroline. [2] It therefore denied restitution. *Id.*, at 791-93.

Amy filed both a notice of appeal and a petition for writ of mandamus with the court of appeals. The court of appeals issued two panel opinions: *In re Amy*, 591 F.3d 792 (5th Cir. 2009) (denying mandamus relief), and *In re Amy Unknown*, 636 F.2d 190 (5th Cir. 2011), on rehearing granting mandamus relief. Paroline filed a timely motion for rehearing *en banc* which was granted.

B. The *en banc* Court of Appeals Opinion

The *en banc* court of appeals issued two opinions, one in initial *en banc* review and the second on rehearing. In its latest opinion, it conducted a statutory interpretation analysis of § 2259. The court held that § 2259 "reflects a broad restitutionary purpose" and requires district courts to

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[2]Paroline filed affidavits from experts that were considered by the District Court that contested the amount of Amy's losses.

award restitution. Slip op., at 17. The court recognized that the district court relied on this Court's holding in *Porto Rico Railway, Light & Power Co. v. Mor*, 253 U.S. 345 (1920) to apply the proximate cause requirement in 18 U.S.C. § 2259(b)(3)(F) to all of the items of restitution in § 2259(b)(3). It also recognized the Government's argument along the same lines requiring a showing of proximate cause to sustain a restitution grant. Slip op., at 19-20. It recognized the Government's argument that seven circuits had rejected Amy's reading of the statute. *Id* at 20.

The *en banc* court construed the statute and held there is a proximate cause requirement only for costs incurred by the victim under the catchall provision of § 2259(b)(3)(F). Slip op., at 20-21. The majority held that § 2259(b)(3)

> [B]egins with an introductory phrase composed of a noun and verb ("full amount of the victim's losses' includes any costs incurred by the victim for – ") that feeds into a list of six items, each of which are independent objects that complete the phrase. Only the last of these items contains the language "proximate result." A double dash opens the list, and semi-colons separate each of its elements, leaving § 2259(b)(3) with a divided grammatical structure that does not resemble the statute in *Porto Rico Railway*, with its flowing sentence that lacks any distinct separation.

Slip op., at 22-23.

The *en banc* Fifth Circuit recognized that three other circuits had similarly applied the rules of statutory construction to come to the same conclusion even though all three have "injected the statute with a proximate cause requirement through alternative means," citing *United States v. Burgess*, 684 F.3d 445 (4th Cir. 2012); *United States v. Aumais*, 656 F.3d 147 (2nd Cir. 2011); and *United States v. Monzel*, 641 F.3d 528 (D.C. Cir.), *cert. denied sub nom. Amy, Victim in Misty Child Pornography Series v. Monzel*, _ U.S. _, 132 S. Ct. 756 (2011). Slip op., at 26 and n. 11.

Those circuits used traditional principles of "bedrock" tort and criminal law liability to find

a proximate cause requirement for restitution under § 2259.[3] The *en banc* Fifth Circuit held those three Circuits based their reasoning on *Monzel* and flatly rejected it. It refused to "interject the statute with a proximate cause requirement based on traditional principles of liability." Slip op., at 29. It went on to hold that the injection of § 2259 with traditional proximate cause requirements could comport with this Court's holdings only if § 2259 "were naked of causal limitations. But it is not." Slip op., at 30 (citation omitted). The Fifth Circuit held that the "selective inclusion and omission of causal requirements in § 2259 together with language pointing away from ordinary causation, suggest that Congress intended to depart from, rather than incorporate, a tradition of generalized proximate cause." Slip op., at 31.

The *en banc* court also reviewed other circuits which had found the proximate cause requirement in § 2259(b)(3)(F) applied to the five categories preceding it but found the other circuits not compelling. Slip op., 26-27, *citing United States v. McDaniel*, 631 F.3d 1204 (11th Cir. 2011); *United States v. Laney*, 189 F.3d 954 (9th Cir. 1999).

The court then considered the Government's argument that principles of tort and criminal law liability limit the award of restitution to losses proximately caused by the defendant's actions. The *en banc* Fifth Circuit recognized that at least three circuits have accepted that view and derived a proximate cause require from traditional tort and criminal law along with the definition of victim in § 2259(c). Slip op., at 28, *citing Monzel*, 641 F.3d., at 535; *Burgess*, *Aumais*, *Kearney* and *United States v. Evers*, 669 F.3d 645 (6th Cir. 2012). The court wrote:

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[3]For sentencing guideline purposes, relevant conduct under U.S.S.G. § 1B1.3 and restitution under U.S.S.G. § 5E1.1 are inexorably intertwined. It is undisputed that Amy's actual sexual abuse can not be considered as relevant conduct under §1B1.3. Section 2259 is enumerated as part of §5E1.1.

> The D.C. Circuit rejected the view expressed by the *In re Amy Unknown* panel, explaining that "[h]ad Congress meant to abrogate the traditional requirement for everything but the catch-all, surely it would have found a clearer way to do so." The D.C. Circuit criticized this court's decision in *Amy* because "a 'general' causation requirement without any subsidiary proximate causation requirement is hardly a requirement at all"; "[s]o long as the victim's injury would not have occurred but for the defendant's offense, the defendant would be liable for the injury." The circuits that have adopted the D.C. Circuit's view have pursued a similar line of reasoning. *We do not accept this reasoning, however, and refuse to inject the statute with a proximate cause requirement based on traditional principles of tort.*

Slip op., at 29. (citations omitted) (emphasis added).

The *en banc* court held the D.C. Circuit's analysis comports with this Court's statutory interpretation guidance

> [O]nly if § 2259 were naked of causal limitations. But it is not. In assessing whether Congress intended a broad proximate cause limitation, we cannot ignore that § 2259 expresses causal requirements, yet isolates them to two discrete points: the definition of victim as an "individual harmed *as a result of* the commission of a crime," and the limitation of "any other losses" to those that are the "*proximate result* of the offense.

Slip op, at 30. (citations omitted, emphasis in original).

It therefore held it was Congress' intent to depart from, rather than to incorporate, the tradition of generalized proximate cause. Slip op., at 31.

The *en banc* court also rejected the Government's argument that its interpretation would result in an absurd result and constitutional implications could be avoided by reading § 2259 as requiring proximate causation for all categories of losses. The court rejected the Government's position that the amount of restitution could be grossly disproportionate to the gravity of the offense. *See generally* Slip op., at 36-37 rejecting the argument that restitution is punishment similar to forfeiture and subject to Eighth Amendment limitations as found by this Court in *United States v. Bajakijian*, 524 U.S. 321 (1998).

B. Judge Davis's Dissent

In his dissenting opinion, Judge Davis[4] rejected what he called the majority's "one size fits all rule" requiring district courts to assess restitution for the full amount of damages against each defendant when multiple violators contribute to the victim's damages. Judge Davis would construe § 2259(b)(2) as expressly incorporating the general restitution requirements of 18 U.S.C. § 3664 – including the requirement that restitution be based on "the *amount of the loss* sustained by a victim *as a result of the offense*...." The dissent further argues that its interpretation is consistent with the § 2259(c), defining "victim" as the "individual harmed *as a result* of a commission of crime under this chapter."Slip op., at 46. (emphasis in original).

The dissent relied in this Court's opinion in *Porto Rico Railway* to find that the proximate cause requirement in § 2259(b)(3)(F) applies equally to the previous five subcategories of losses. The dissent notes this is consistent with the Eleventh Circuit in *McDaniel* and the Ninth Circuit in *Laney* Slip op., at 47.[5]

The dissent, relying on *Burgess* and *Kearney* would have found that restitution was available only for harm proximately caused by the defendant's criminal acts. Slip op., at 50-51. In determining the amount of restitution, the dissent agreed that Amy is entitled to a restitution from all offenders equal to the total amount of her losses. But it argues the majority ignored the second clause in 18 U.S.C. § 3664(h), which allows district courts to apportion liability among defendants

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[4]Joined by Judges King, Smith and Graves.

[5]The dissent also rejected the attempt in *In re Amy* to distinguish § 2259 from *Porto Rico Railway* on the basis that the subsections in § 2259(b)(3) are separated by semicolons rather than commas. Slip op., 48, n. 3. *See also Ex parte Rodriguez*, 39 Tex. 705 (1873), where the Texas Supreme Court earned the nickname "the semicolon court" by voiding the election of a candidate for governor over the incumbent based on the placement of a semicolon.

"to reflect the level of contribution to the victim's loss and economic circumstances of each defendant." Slip op., at 52. (emphasis in original). The dissent notes that its interpretation is consistent with *McGarity*.

In assessing the amount of restitution to be paid by each defendant, the dissent would set the following guidelines for district courts:

1. The district court must recognize Amy's losses are an aggregation of the acts of the person who abused and filmed her assault, those who distributed the images and those who possessed the images. The culpability of any one defendant regarding Amy's loss is dependent at least in part in the role the individual defendant played with respect to her exploitation, citing *Burgess*.

2. The district court should compute the victim's probable future losses based on evidence of the damages she likely will incur from the date of the defendant's conduct to the foreseeable future including all items in § 2259(b)(3).

3. In cases such as this where multiple individuals have been convicted of contributing to her abuse, the district court has discretion under § 3664(h) either to enter an award for the total amount of her provable losses or some portion of those losses to reflect the defendant's role in causing the damage as well as other circumstances. Slip op., at 53.

Without limiting the district court's discretion, the dissent also would allow district courts to consider the following factors:

1. The egregiousness of the defendant's conduct, including whether he was involved in the physical abuse of this or other victims or attempted to make personal contact with victims whose images he viewed or possessed.

2. For defendants who possessed images of the victim, the number of images he possessed

or viewed and whether he redistributed those images to others.

3. The financial means of the defendant and his ability to satisfy the award.

4. The $150,000 liquidated civil damage award authorized by 18 U.S.C. § 2255 or a percentage thereof as a guide in fixing the amount of restitution.

5. As guides, awards made in similar cases.

6. Any other facts relevant to the defendant's level of contribution to the victim's loss and economic circumstances of the defendant. Slip op., at 54.

V. REASONS FOR REVIEW

A. The Circuit Split

In the instant case, the *en banc* Court of Appeals considered and rejected the holdings of seven other circuits in eight cases. Its holding is not a narrow conflict or a conflict with minimal practical effect. It is a flat rejection of the reasoning of *every* other circuit which has considered the issue. The conflict has immense implications for both defendants and victims in child pornography cases.[6]

The *en banc* Fifth Circuit's position as the sole circuit rejecting a proximate cause requirement to determine restitution essentially destroys the court's attempt to ameliorate the harshness of its holding – joint and several liability with others. Persons who possess child pornography in every other circuit which has considered the issue would have contribute little if any to the restitution pool. Persons convicted in the Fifth Circuit would be left to carry the restitution

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[6]The Fifth Circuit's holding in the instant case also puts it in conflict with another decision by that court, albeit construing a related but different restitution statute, 18 U.S.C. § 3663A. *United States v. Sharma*, No. 11-20102 (5th Cir. December 20, 2012) (not yet reported) (limiting restitution awards to the offenses of conviction).

burden while those residing in other circuits would not be subject to multi-million dollar restitution orders.

In addition, the *en banc* Fifth Circuit effectively requires defendants convicted of possession of child pornography to pay restitution for a crime they did not commit – the physical abuse of the child. In the instant case, Amy was sexually abused by a relative. Some significant portion of the $3.4 million in claimed restitution was caused by his abuse of the child.

The *en banc* Fifth Circuit's position as the sole circuit rejecting a proximate cause requirement to determine restitution essentially destroys the court's attempt to ameliorate the harshness of its holding – joint and several liability with others. Persons who possess child pornography in every other circuit which has considered the issue would have contribute little if any to the restitution pool. Persons convicted in the Fifth Circuit would be left to carry the restitution burden while those residing in other circuits would not be subject to multi-million dollar restitution orders.

In addition, the *en banc* Fifth Circuit effectively requires defendants convicted of possession of child pornography to pay restitution for a crime they did not commit – the physical abuse of the child or perhaps the distribution of child pornography. In the instant case, Amy was sexually abused by a relative. Some significant portion of the $3 million in claimed restitution was caused by his abuse of the child. Especially since Paroline would be responsible for restitution for harm caused and identified before his arrest in this case.

Paroline believes that the issue of restitution must be viewed through the prism of the substantial rights of an accused that are pertinent to a sentencing proceeding. In order to comport with the requirements of the Constitution, an order of restitution must be based on the individual's

offense conduct and attributable to the harm caused by the offense of conviction. Clearly, "[w]hen a defendant is ordered to pay restitution in an amount greater than the loss caused, the error affects substantial rights as well as the fairness and integrity of the judicial proceeding." *United States v. Austin*, 479 F.3d 363, 373 (5th Cir. 2007).

Throughout these proceedings, Amy has attempted to isolate her claim for restitution without concern that her request for restitution was made incident to Paroline's sentencing incident to his conviction for possession of child pornography. Further, in this case, Amy has stipulated that

> *"[N]one of the damages for which 'Amy' is now seeking restitution flow from anyone telling her specifically about Mr. Paroline or telling her about his conduct which was the basis of the prosecution in this case."*

(Hearing October 28, 2009, p. 16) (Emphasis added).

Thus, either through traditional concept of tort liability or criminal responsibility or through statutory construction, 2259 must be read to include a proximate cause element. Otherwise, courts will be instructed that traditional concepts of individual sentencing be restricted to the offense of conviction. As this Court stated in *Roberts v. Sea-Island Services, Inc. Et Al.*, _ U.S. _, 132 S. Ct. 1350 (2012) stated that:

> Statutory language, however, "cannot be construed in a vacuum. It is fundamental cannon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dept. Of Treasury*, 489 U.S. 803, 909 (1989).

The split among the circuits is especially cogent in the instant case in that three of the eight cases in which the Fifth Circuit is in conflict involved claims made by Amy.[7] Not only is the result

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[7]The cases are *Aumais*, *Monzel* and *McGarity*. This raises a question which was not ripe for review by the lower courts and which is not presented to this Court for that reason: Is Amy collaterally estopped from claiming a right to restitution without a showing of proximate cause since she litigated and lost that issue in three other cases?

different in the circuits for defendants, it also is different for Amy personally. In those three cases, she litigated the issue decided by the Fifth Circuit and lost. Both defendants and victims of child pornography should have a uniform national rule as to whether restitution ordered pursuant to § 2259 includes losses caused by sexual abuse by a third party or whether it is limited to restitution for losses proximately caused by the defendant.

B. The Excessive Fines Clause

The *en banc* Fifth Circuit also conflicts with this Court's holding in *United States v. Bajakian*, 524 U.S. 321 (1998). *See* Slip op. 36-38. In *Bajakian*, this Court held that a forfeiture of property grossly disproportionate to the crime violates the Eighth Amendment, U.S. CONST., amend. VIII. The Fifth Circuit rejected the Government's argument that construing § 2259 without a proximate cause requirement could result in an Excessive Fines Clause violation. Slip op., at 36.

The Circuit held "ultimately, while the imposition of full restitution may appear harsh, it is not grossly disproportionate to the crime of receiving and possessing child pornography." Slip op., at 38. This ignores the effects of the crime of sexual abuse of the child, a separate offense for which those who receive the pornography are not guilty.

In *Bajakian*, the Court held a forfeiture under 18 U.S.C. § 982(a)(1) was a fine and forfeiture of $357,144 for failure to declare the cash when leaving the country was excessive and disproportionate to the harm caused by the offense. In the instant case, Paroline was guilty of possessing two images of Amy. The Circuit would require that he be responsible for more than $3 million in restitution – including losses to Amy caused not by the possession of the images or even the existence of the images but losses caused by the sexual abuse she suffered at the hands of her uncle.

Restitution, like forfeiture in the context of *Bajakian*, is part of the criminal sentence, *United States v. Satterfield*, 743 F.2d 827, 836-37 (11th Cir. 1984). It is part of the rehabilitation of the offender and should be tailored to the offender's situation, *id.* *See also Kelly v. Robinson*, 479 U.S. 36 (1986) (holding that restitution is part of the criminal sentence related to the defendant's rehabilitation, not a debt owed the victim). In the instant case, $3.4 million in restitution is clearly disproportionate to Paroline's criminal conduct related to Amy. He possessed two of her images among hundreds of images of child pornography. While not minimizing the effects of child pornography on its victims, Paroline's criminal acts related to Amy constituted at most a small part of the injury done to her by her uncle's acts including both the physical sexual abuse and distributing the pictures on the internet.

If the amount of restitution assessed as part of the criminal sentence does not include a proximate cause requirement, the result can be like that in the instant case, disproportionate to the defendant's criminal acts. It would run afoul of the Eighth Amendment. In cases such as the instant case, it results in persons who possess child pornography being held financially responsible for the losses caused by the sexual abuser without a showing that the defendant's possession was directly connected with the sexual abuse.[3]

VI. CONCLUSION

The *en banc* Fifth Circuit's holding conflicts with the holdings of every other circuit which has considered the issue – including three involving Amy, the victim in the instant case. The Fifth Circuit requires neither proximate cause nor cause in fact to justify a multimillion dollar restitution

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[3]There is a difference between a person who sexually abuses a child for the purpose of creating pornography and the person who engages in sexual abuse of children for his enjoyment and creates pictures as trophies to collect and trade.

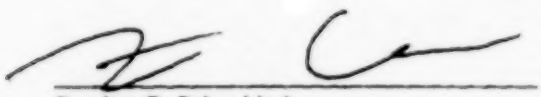
order, a position uniformly rejected by other circuits. It requires a restitution award for injuries caused by offenses other than the offense of conviction. The Fifth Circuit even imposed on Paroline a restitution requirement for harm caused the victim by the sexual abuse of her uncle, harm not caused by Paroline's criminal acts of possessing child pornography.

This Court should grant certiorari to resolve the circuit conflicts. It also should grant certiorari to determine whether restitution which is grossly disproportionate to the defendant's criminal acts is an excessive fine for purposes of the Eighth Amendment.

WHEREFORE, PREMISES CONSIDERED, Paroline prays that this Court grant his petition for writ of certiorari, order full briefs and oral arguments, and reverse the en banc opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

Schneider & McKinney, P.C.



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I certify that a true and correct copy of the above document and its appendix was served on the following persons by mailing them copies, postage paid, on this 29th day of January, 2013.

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ORIGINAL

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DOYLE RANDALL PAROLINE	§	PETITIONER
	§	
VS.	§	
	§	
THE UNITED STATES OF AMERICA	§	RESPONDENTS
and	§	
AMY UNKNOWN	§	

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPEAL CAUSE NO. 09-41238
IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CAUSE NOS. 09-41238 AND 09-41254
IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above documents was served on the below named persons by mailing them, certified mail return receipt requested, on this 29th day of January, 2013.

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Appendix A
En Banc Opinion on Rehearing

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
November 19, 2012
Lyle W. Cayce
Clerk

No. 09–41238

In re: AMY UNKNOWN,

Petitioner

Consolidated with 09–41254

UNITED STATES OF AMERICA,

Plaintiff - Appellee

DOYLE RANDALL PAROLINE

Defendant - Appellee

v.

AMY UNKNOWN,

Movant - Appellant

No. 09-31215

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

MICHAEL WRIGHT

Defendant - Appellant

Appeals from the United States District Courts
for the Eastern District of Texas
and the Eastern District of Louisiana

Before STEWART, Chief Judge, and KING, JOLLY, DAVIS, JONES, SMITH, GARZA, DENNIS, CLEMENT, PRADO, OWEN, ELROD, SOUTHWICK, HAYNES, and GRAVES, Circuit Judges.[1]

GARZA, Circuit Judge, joined by STEWART, Chief Judge, JOLLY, JONES, CLEMENT, PRADO, OWEN, ELROD, and HAYNES, Circuit Judges:

The original opinion in this matter was issued by the en banc court on October 1, 2012. *In re Unknown*, No. 09-41238, 2012 WL 4477444 (5th Cir. Oct. 1, 2012) (en banc). A petition for rehearing en banc is currently pending before the en banc court. The petition for rehearing en banc is granted in part. Accordingly, we WITHDRAW our previous opinion and replace it with the following opinion.[2]

The issue presented to the en banc court is whether 18 U.S.C. § 2259 requires a district court to find that a defendant's criminal acts proximately caused a crime victim's losses before the district court may order restitution, even though that statute only contains a "proximate result" requirement in § 2259(b)(3)(F). All our sister circuits that have addressed this question have expanded the meaning of § 2259(b)(3)(F) to apply to all losses under § 2259(b)(3), thereby restricting the district court's award of restitution to a victim's losses

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[1] Judge Higginson is recused and did not participate in any aspect of this en banc rehearing.

[2] In Wright's case, because the Government did not appeal and Amy did not seek mandamus review, we revised our opinion to affirm Wright's sentence, in compliance with *Greenlaw v. United States*, 554 U.S. 237 (2008).

that were proximately caused by a defendant's criminal acts. A panel of this court rejected that reading, and instead focused on § 2259's plain language to hold that § 2259 does not limit a victim's total recoverable losses to those proximately resulting from a defendant's conduct. A subsequent panel applied that holding to another appeal, yet simultaneously questioned it in a special concurrence that mirrored the reasoning of our sister circuits. To address the discrepancy between the holdings of this and other circuits, and to respond to the concerns of our court's special concurrence, we granted rehearing en banc and vacated the panel opinions.

This en banc court holds that § 2259 only imposes a proximate result requirement in § 2259(b)(3)(F); it does not require the Government to show proximate cause to trigger a defendant's restitution obligations for the categories of losses in § 2259(b)(3)(A)–(E). Instead, with respect to those categories, the plain language of the statute dictates that a district court must award restitution for the full amount of those losses. We VACATE the district court's judgment in *United States v. Paroline*, 672 F. Supp. 2d 781 (E.D. Tex. 2009), and REMAND for further proceedings consistent with this opinion. We AFFIRM the district court's judgment in *United States v. Wright*, No. 09-CR-103 (E.D. La. Dec. 16, 2009).

I

We review a set of appeals arising from two separate criminal judgments issued by different district courts within this circuit. Both appeals involve restitution requests by Amy, a young adult whose uncle sexually abused her as a child, captured his acts on film, and then distributed them for others to see. The National Center for Missing and Exploited Children, which reports that it has found at least 35,000 images of Amy's abuse among the evidence in over 3,200 child pornography cases since 1998, describes the content of these images

as "extremely graphic." The Government reports that restitution has been ordered for Amy in at least 174 child pornography cases across the United States in amounts ranging from $100 to $3,543,471.

A

In the consolidated cases *In re Amy*, 591 F.3d 792 (5th Cir. 2009), and *In re Amy Unknown*, 636 F.3d 190 (5th Cir. 2011), a panel of this court reviewed Amy's mandamus petition and appeal, both of which challenged the district court's order denying Amy restitution in connection with a criminal defendant's sentence.

In the case underlying Amy's mandamus petition and appeal, Doyle Paroline ("Paroline") pled guilty to 18 U.S.C. § 2252 for possessing 150 to 300 images of minors engaged in sexually explicit conduct. At least two images were of Amy. Pursuant to Amy's right to restitution under the Crime Victims' Rights Act, 18 U.S.C. § 3771, the Government and Amy moved the district court to order restitution under § 2259. Amy supported this request with her psychiatrist's report, which itemized her future damages for specific categories of treatment and estimated total damages nearing $3.4 million.[3]

The district court denied Amy restitution. *Paroline*, 672 F. Supp. 2d at 782. The district court held that § 2259 required the Government to prove that by possessing images depicting Amy's sexual abuse, Paroline proximately caused the injuries for which she sought restitution. *Id.* at 791. Concluding that the Government failed to show this causal link, the district court denied Amy restitution. *Id.* at 793. Amy petitioned for mandamus, asking this court to

[3] Amy attested that this amount reflects the total amount of her losses from the production, distribution, and possession of the images of her abuse and primarily comprises costs for future psychological care and future lost income.

direct the district court to order Paroline to pay her the full amount of the restitution she had requested.

Over one dissent, that panel denied her relief because it was not clear or indisputable that § 2259 mandates restitution irrespective of proximate cause. *In re Amy*, 591 F.3d at 794–95. Amy sought rehearing and filed a separate notice of appeal from the district court's restitution order; her mandamus petition and appeal were consolidated. *See In re Amy Unknown*, 636 F.3d at 192–93. The panel assigned to hear Amy's appeal granted her rehearing request. *Id.* at 193. That panel then granted mandamus and rejected a requirement of proof of proximate cause in § 2259 because "[i]ncorporating a proximate causation requirement where none exists is a clear and indisputable error," but declined to reach the question of whether crime victims such as Amy have a right to an appeal. *Id.* at 193, 201. The panel remanded for the district court's entry of a restitution order. *Id.* at 201.

B

In *United States v. Wright*, 639 F.3d 679 (5th Cir. 2011), a separate panel of this court heard the appeal of Michael Wright ("Wright"). Like Paroline, Wright pled guilty to 18 U.S.C. § 2252 for possession of over 30,000 images of child pornography, which included images of Amy's abuse.[4] The Government

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[4] Wright pled guilty pursuant to a plea agreement in which he generally waived his right to appeal but reserved his right to appeal "any punishment in excess of the statutory maximum." Wright's plea agreement stated that "the restitution provisions of Sections 3663 and 3663A of Title 18, United States Code will apply" and made no reference to § 2259. During the guilty plea colloquy, the district court restated the terms of the plea agreement regarding Wright's appeal waiver. The district court asked Wright if he understood all the rights he was waiving, and he responded that he did. The district court also asked Wright if he understood that he "also may be required to reimburse any victim for the amount of his or her loss under the Victim Restitution Law, if that term is applicable." Wright again said he understood.

The Government seeks to assert the appeal waiver Wright signed only if we hold that restitution is limited by proximate cause in all respects. It concedes, however, that Wright's

sought restitution for Amy under § 2259, supporting its request with the same psychiatric report Amy provided in Paroline's case. The district court awarded Amy $529,661 in restitution, explaining that "[t]his amount was reached by adding the estimated costs of the victim's future treatment and counseling at $512,681.00 and the costs of the victim's expert witness fees at $16,980.00." *United States v. Wright*, No. 09-CR-103, at 5 (E.D. La. Dec. 16, 2009). The district court did not explain why it awarded no restitution for the other amounts that Amy had requested and made no reference to a proximate cause requirement. *See id.* Observing that Amy had been awarded restitution in another district court, the district court further explained that "[t]he restitution ordered herein is concurrent with any other restitution order either already imposed or to be imposed in the future payable to this victim." USCA5 R. 111–112. Wright appealed to contest the restitution order.

The *Wright* panel first found that the appeal waiver in Wright's plea agreement did not foreclose his right to appeal the restitution order. *Wright*, 639 F.3d at 683. Then, applying *Amy*'s holding, the Wright panel concluded that Amy was entitled to restitution but that the district court had given inadequate reasons for the award it assessed. *Id.* at 685–86. The panel remanded for further findings regarding the amount of the award. *Id.* at 686. The three

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appeal waiver would not be valid if the en banc court holds that § 2259 lacks a proximate cause requirement that covers all categories of losses because Wright did not waive his right to appeal a sentence unbounded by a proximate cause limitation. Because we hold today that § 2259's isolated "proximate result" language does not cloak all categories of losses with a proximate cause requirement, we need not further address the appeal waiver issue. We have repeatedly held that appeal waivers the Government does not seek to enforce are not self-enforcing and that the Government can effectively "waive the waiver." *See United States v. Acquaye*, 452 F.3d 380, 381 (5th Cir. 2006). Given the Government's concession and our holding on the substance of § 2259, we conclude that the Government is not seeking to enforce the appeal waiver in this case. Accordingly, we conclude that the appeal waiver does not bar Wright's appeal. *See id.*

members on the *Wright* panel, however, joined a special concurrence that questioned *Amy*'s holding and suggested that the court rehear both cases en banc, in part because this court was the first circuit to hold that a proximate cause requirement does not attach to the "full amount of . . . losses" under § 2259(b)(3). *See id.* at 689–90, 692 (Davis, J., specially concurring).

This court held the mandates in both *Amy* and *Wright*. A majority of this court's members voted to rehear these opinions en banc to resolve the question of how to award restitution under § 2259 and to address other related questions raised by these appeals. *See In re Amy Unknown & United States v. Wright*, 668 F.3d 776 (5th Cir. 2012) (granting rehearing en banc).

II

In rehearing *Amy* and *Wright* en banc, we address the following issues: (1) whether the Crime Victims' Rights Act ("CVRA") grants crime victims a right to an appeal or, if not, whether this court should review Amy's mandamus petition under the standard this court has applied to supervisory writs; (2) whether 18 U.S.C. § 2259 requires the Government to show a defendant's criminal acts proximately caused a victim's injuries before a district court may award restitution; and (3) whether, in light of our holding with respect to § 2259, the district courts in *Amy* and *Wright* erred.

A

Amy petitioned for mandamus and, after this court initially denied her relief, appealed from the district court's restitution order. In the panel opinion in *Amy*, this court granted her mandamus on rehearing under our traditional mandamus inquiry, which this court held in *In re Dean*, 527 F.3d 391, 394 (5th Cir. 2008) (per curiam), applies to appeals under the CVRA. *See Amy*, 636 F.3d at 197–98. In *Amy*, the panel declined to decide whether the CVRA entitled her

to bring a direct appeal, *see id.* at 194–97, even though *Dean* seemingly foreclosed that argument. *See Dean*, 527 F.3d at 394 (rejecting victims' assertion that the standards governing an appeal apply on CVRA review). Amy asks the en banc court to construe the CVRA to guarantee crime victims the right of appeal and alternatively asks the court to hear her mandamus petition under our supervisory mandamus power, which would hold her mandamus petition to a less onerous standard of review than *Dean* requires.

1

The CVRA grants crime victims, including Amy, "[t]he right to full and timely restitution as provided in law," 18 U.S.C. § 3771(a)(6), and makes explicit that crime victims, their representatives, and the Government may move the district court to enforce that right. *Id.* § 3771(d)(1); *see id.* § 3771(e) (defining "crime victim" as "a person directly and proximately harmed as a result of the commission of a Federal offense."). The CVRA further commands that "[i]n any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded [this right]." *Id.* § 3771(b)(1). Where a district court denies a victim relief, the CVRA provides that

> [T]he movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed.

Id. § 3771(d)(3); *see id.* § 3771(d)(5)(B) (requiring the victim to petition for mandamus within fourteen days). The CVRA further grants the Government, "[i]n any appeal in a criminal case," the authority to "assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal

relates," *id.* § 3771(d)(4), and makes clear that "[n]othing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." *Id.* § 3771(d)(6).

Amy's argument effectively requires us to address two questions: first, whether the CVRA entitles crime victims to an appeal; and second, whether the CVRA entitles crime victims' mandamus petitions through the review standards governing an appeal. First, we observe that the plain text of the CVRA expressly grants crime victims only a right to mandamus relief and makes no mention of any right of crime victims to an appeal. *See* 18 U.S.C. § 3771(d)(3); *Dean*, 527 F.3d at 394. In contrast, the CVRA grants the Government the right to mandamus while also retaining the Government's right to a direct appeal. *Id.* § 3771(d)(4) (allowing only the Government to "assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates."). In interpreting the statute, absent contrary indication, we presume that Congress "legislated against the background of our traditional legal concepts," *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437 (1978), including that crime victims have no right to appeal. *See Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (citing *United States ex rel. Louisiana v. Jack*, 244 U.S. 397, 402 (1917)) (explaining that "[t]he rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment.").

Amy fails to show any language in the statute that reflects Congress' intent to depart from this principle. Instead, she protests that before the CVRA's enactment, this court heard appeals from nonparties with a direct interest in aspects of criminal prosecutions and contends that this suggests that the crime victims retain a similar right to appeal under the CVRA. *See Amy*, 636 F.3d at 195–96 (discussing *United States v. Briggs*, 514 F.2d 794 (5th Cir.

1975); *United States v. Chagra*, 701 F.2d 354 (5th Cir. 1983)). The cases Amy cites, however, are unconvincing. They allowed non-parties to appeal discrete pre-trial issues with constitutional implications, which were unrelated to the merits of the criminal cases from which they arose. *See Briggs*, 514 F.2d at 799 (holding that persons named as unindicted co-conspirators in an indictment had standing to challenge the power of a grand jury to charge them with criminal conduct without indicting them); *Chagra*, 701 F.2d at 360 (allowing newspapers and a reporter to appeal an order restricting their access to a pretrial bail reduction hearing). These cases do not stand for the proposition that this court has allowed victims any post-judgment right of appeal and, moreover, do not support the inference that Congress drafted the CVRA with the understanding that crime victims had any right to an appeal. Because nothing in the CVRA suggests that Congress intended to grant crime victims the right to an appeal or otherwise vary the historical rule that crime victims do not have the right of appeal, we conclude that the CVRA grants crime victims only mandamus review.[5]

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[5] Six of our sister circuits generally favor a reading of the statute that allows no appeal, and no circuit has expressly granted victims the right to an appeal under the CVRA. *See United States v. Alcatel-Lucent France, SA*, Nos. 11–12716, 11–12802, 2012 WL 3139014, at *5 (11th Cir. Aug. 3, 2012); *United States v. Monzel*, 641 F.3d 528, 533 (D.C. Cir.), *cert. denied*, *Amy, Victim in Misty Child Pornography Series v. Monzel*, 132 S. Ct. 756 (2011); *United States v. Aguirre-Gonzalez*, 597 F.3d 46, 53–56 (1st Cir. 2010); *In re Antrobus*, 519 F.3d 1123, 1128–30 (10th Cir. 2008); *Kenna v. U.S. Dist. Court*, 435 F.3d 1011, 1017 (9th Cir. 2006); *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555, 562–63 (2d Cir. 2005); *see also In re Acker*, 596 F.3d 370, 373 (6th Cir. 2010) ("[W]here the [purported victim's] direct appeal was filed at the same time as the [CVRA] mandamus petition and raises the identical issues, there is no additional right of appeal.").

Further supporting this conclusion is that under the Victim and Witness Protection Act ("VWPA"), the CVRA's predecessor in which restitution was optional rather than mandatory, at least one circuit court denied victims a right to any relief because "[n]owhere in the statute does Congress suggest that the VWPA was intended to provide victims with a private remedy to sue or appeal restitution decisions." *United States v. Mindel*, 80 F.3d 394, 397 (9th Cir. 1996). This same logic extends to limit the right of crime victims under the CVRA to only the

Next, we consider whether the CVRA nonetheless requires appellate courts to apply the standard of review governing a direct criminal appeal to mandamus petitions, and conclude it does not. When assessing the meaning of the term "mandamus" in the CVRA, we presume that this "statutory term . . . ha[s] its common-law meaning," absent contrary indication. *Taylor v. United States*, 495 U.S. 575, 592 (1990). The Supreme Court has explained that "[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Kerr v. U.S. Dist. Court*, 426 U.S. 394, 402 (1976); *accord Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004). "[T]he writ has traditionally been used in the federal courts only . . . to compel it to exercise its authority when it is its duty to do so." *Kerr*, 426 U.S. at 402 (quotation marks omitted). "[O]nly exceptional circumstances amounting to a judicial usurpation of power will justify the invocation of this extraordinary remedy." *Id.* (quotation marks omitted). Mandamus traditionally "is not to be used as a substitute for an appeal, or to control the decision of the trial court in discretionary matters." *Plekowski v. Ralston-Purina Co.*, 557 F.2d 1218, 1220 (5th Cir. 1977). Issuance of the writ is largely a matter of discretion with the court to which the petition is addressed. *See Schlagenhauf v. Holder*, 379 U.S. 104, 112 n.8 (1964).

Certain aspects of the CVRA convince us that Congress intended mandamus in its traditional sense when it selected the word "mandamus." *See*

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mandamus relief that the statute clearly expresses. *See id.*

The cases Amy relies on, moreover, further disfavor allowing a § 1291 appeal. Any persuasive force that *In re Siler*, 571 F.3d 604, 608 (6th Cir. 2009) (allowing crime victims to appeal under § 1291 when they sought the use of a presentencing report in a subsequent civil suit), may have is undercut by the Sixth's Circuit later decision not to extend a right of appeal to a crime victim who simultaneously petitioned for mandamus relief. *See In re Acker*, 596 F.3d 370, 373 (6th Cir. 2010). Likewise, the Third Circuit's decision allowing a crime victim a § 1291 appeal, without any analysis, in *United States v. Kones*, 77 F.3d 66, 68 (3d Cir. 1996), also fails to convince us that allowing crime victims a § 1291 appeal is proper.

Taylor, 495 U.S. at 592. Reading the statute's provisions together, the CVRA seems to intentionally limit victims' right to review as an extraordinary remedy because it authorizes review only where a district court fails to fulfill a statutory duty; the statute does not extend victims' right to review to situations where a district court acts on a discretionary matter. *See Kerr*, 426 U.S. at 402. To explain, the CVRA lists eight rights that it ensures crime victims, including the right to restitution. 18 U.S.C. § 3771(a)(1)–(8). The restrictive statement, "A crime victim has the following rights," precedes the list of those rights and supports the conclusion that the CVRA's grant of rights is exclusive. *Id.* § 3771(a). And only where the district court denies a motion seeking to assert one of those rights does the CVRA allow a victim to seek the review of an appellate court. *See id.* § 3771(d)(3). This limitation suggests that in granting relief, the district court retains discretion to select the appropriate means to ensure victims' rights, and that victims may only properly seek appellate intervention where the district court clearly fails to "exercise its authority when it is its duty to do so." *See Kerr*, 426 U.S. at 402; *see also Plekowski*, 557 F.2d at 1220 ("The remedy of mandamus . . . is not to be used . . . to control the decision of the trial court in discretionary matters."). Under this reading, only the Government would retain a right to appeal even seemingly discretionary actions, *see* 18 U.S.C. § 3771(d)(4), and could elect to appeal the district court's order to the extent it exercises its own prosecutorial discretion to do so. *See id.* § 3771(d)(6). If we were to instead read the CVRA as extending a right of appeal to victims, we would expand the rights granted to crime victims and simultaneously erode the CVRA's attempt to preserve the Government's discretion. *See id.* A reading of the statute that limits victims' appellate review to the traditional mandamus inquiry thus respects both the CVRA's preservation of the Government's and the

district court's traditional discretion while safeguarding the limited rights the CVRA grants.

The very short timeline in which appellate courts must act, and the fact that a single circuit judge may rule on a petition, confirm the conclusion that Congress intended to limit crime victims' appellate relief under the CVRA to traditional mandamus review. *See* 18 U.S.C. § 3771(d)(3). These requirements reflect that appellate courts must grant relief quickly, but rarely, as "a drastic remedy generally reserved for really 'extraordinary' cases." *In re E.E.O.C.*, 709 F.2d 392, 394 (5th Cir. 1983) (citing *Kerr*, 426 U.S. at 402).

Amy has failed to show that Congress intended to grant crime victims anything other than traditional mandamus relief under the CVRA.[6] While, as

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[6] Amy nevertheless insists that the CVRA's requirements that the courts of appeals "take up and decide" a petition and "ensure that the crime victim is afforded" all his or her rights in a court proceeding support recognizing victims' right to an appeal and disfavor an interpretation that would provide for traditional mandamus review, which is typically discretionary. *See* 18 U.S.C. §§ 3771(b)(1), (d)(3). The requirement that appellate courts "take up and decide" a petition, however, relates directly to the short time period in which Congress directs appellate courts to act; this short time period, as we have already explained, favors, rather than opposes, the use of mandamus. *See supra*. Similarly, Amy fails to note that the command that federal courts "ensure that the crime victim is afforded" certain rights falls within a section labeled "In general." *See id.* § 3771(b)(1). Placed in context, this language merely reflects Congress' intention to make plain that federal courts must guard the specific, but necessarily limited, rights spelled out in the CVRA through the processes prescribed in its other subsections. This language does not suggest that the grant of mandamus in this context is not discretionary. Amy's arguments are unavailing.

Only two circuits support Amy's position that she is entitled to something more closely resembling direct appellate standards of review. With little analysis, the Second Circuit has concluded an abuse of discretion standard should govern CVRA mandamus petitions. *See In re W.R. Huff*, 409 F.3d at 562–63. That court divined a relaxed standard from the express terms of the statute and reasoned only that "[i]t is clear . . . that a petitioner seeking relief pursuant to the mandamus provision set forth in § 3771(d)(3) need not overcome the hurdles typically faced by a petitioner seeking review of a district court determination through a writ of mandamus." *Id.* at 562–63. The lack of reasoning accompanying the Second Circuit's use of a relaxed standard of review fails to convince us that anything other than traditional mandamus standards should govern our review of CVRA petitions.

The Ninth Circuit also has provided for relaxed review, focusing on legal error in reviewing a crime victim's mandamus petition under the CVRA. To justify this relaxed review,

Amy insists, it may be more difficult for a crime victim to enforce rights through mandamus than appeal, this limitation reflects the express language of the statute and honors the common law tradition in place when the CVRA was drafted.

2

Our conclusion that the CVRA does not provide crime victims with appellate review does not foreclose Amy's somewhat different request that we apply our supervisory mandamus power of review to her mandamus petition, which would lower the hurdles to relief under mandamus. *See In re McBryde*, 117 F.3d 208, 223 (5th Cir. 1997) (acknowledging that "courts of appeals have possessed the power to issue supervisory writs of mandamus in order to prevent practices posing severe threats to the proper functioning of the judicial process"); *In re E.E.O.C.*, 709 F.2d at 395 (in allowing a supervisory writ to proceed as a one-time-only device, this court advised it would only grant the writ if "there is 'usurpation of judicial power' or a clear abuse of discretion" and the movant

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the Ninth Circuit emphasized that "[t]he CVRA explicitly gives victims aggrieved by a district court's order the right to petition for review by writ of mandamus, provides for expedited review of such a petition, allows a single judge to make a decision thereon, and requires a reasoned decision in case the writ is denied." *Kenna*, 435 F.3d at 1017. But a later decision suggests that the Ninth Circuit's interpretation in *Kenna* was influenced by the facts of that case and a desire to reach a question of law that its traditional mandamus inquiry would not have allowed; in that later case, the Ninth Circuit explained that it applies its normal test to CVRA mandamus petitions, and merely emphasizes the question of legal error in assessing a crime victim's right to relief. *See In re Andrich*, 668 F.3d 1050, 1051 (9th Cir. 2011) (per curiam).

While Amy asserts that two additional circuits favor her position, those courts have not clearly accepted her position, and it is unclear that they would do so if presented with the opportunity to fully analyze the legal issues this question presents. *See In re Stewart*, 552 F.3d 1285 (11th Cir. 2008) (granting mandamus on question of whether a person was a crime victim who could participate in district court proceedings without reviewing traditional mandamus factors); *In re Walsh*, 229 F. App'x 58, 60–61 (3d Cir. 2007) (in dicta, agreeing with the Second and Ninth Circuits that "mandamus relief is available under a different, and less demanding, standard under 18 U.S.C. § 3771 in the appropriate circumstances.").

showed it had a clear and indisputable right to a writ) (quoting *Schlagenhauf*, 379 U.S. at 110). Even so, we need not resolve this question. Our traditional inquiry suffices to afford Amy the relief she requests. *See* IV-A *infra*. *Cf. Aguirre–Gonzalez*, 597 F.3d at 53–56 (declining to settle question of standard of review because neither the traditional mandamus standard nor a more relaxed standard would afford relief in the circumstances of that case).

Because we hold that the CVRA entitles Amy to only mandamus relief, we dismiss her appeal. Under our traditional mandamus inquiry, we will grant Amy's requested mandamus only if (1) she has no other adequate means to attain the desired relief; (2) she has demonstrated a clear and indisputable right to the issuance of a writ; and (3) in the exercise of our discretion, we are satisfied that the writ is appropriate. *See Dean*, 527 F.3d at 394.

B

Wright appeals from the district court's restitution order. This court reviews the legality of the restitution order de novo. *United States v. Arledge*, 553 F.3d 881, 897 (5th Cir. 2008). If the restitution order is legally permitted, we then review the amount of the order for an abuse of discretion. *Id.*; *United States v. Ollison*, 555 F.3d 152, 164 (5th Cir. 2009).

III

To resolve Amy's mandamus petition and Wright's appeal, we must first ascertain the level of proof required to award restitution to Amy and crime victims like her under 18 U.S.C. § 2259. The parties' dispute turns on the interpretation and effect of the words "proximate result" in § 2259(b)(3)(F).

A

Our analysis again begins with the text of the statute. *See Watt*, 451 U.S. at 265; *In re Rogers*, 513 F.3d 212, 225 (5th Cir. 2008). If § 2259's language is

plain, our "sole function" is to "enforce it according to its terms" so long as "the disposition required by the text is not absurd." *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) (internal quotation marks omitted); *see also Bates v. United States*, 522 U.S. 23, 29 (1997) (holding that courts "ordinarily" should "resist reading words or elements into a statute that do not appear on its face."). The Supreme Court has explained that "[s]tatutory construction 'is a holistic endeavor.'" *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) (quoting *United Savings Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988)). "This Court naturally does not review congressional enactments as a panel of grammarians; but neither do we regard ordinary principles of English prose as irrelevant to a construction of those enactments." *Flora v. United States*, 362 U.S. 145, 150 (1960). Although "the meaning of a statute will typically heed the commands of its punctuation[,] . . . a purported plain-meaning analysis based only on punctuation is necessarily incomplete." *Bank of Or.*, 508 U.S. at 454. "[A]t a minimum," our analysis "must account for a statute's full text, language as well as punctuation, structure, and subject matter." *Id.* at 455.

Only after we apply principles of statutory construction, including the canons of construction, and conclude that the statute is ambiguous, may we consult legislative history. *Carrieri v. Jobs.com, Inc.*, 393 F.3d 508, 518–19 (5th Cir. 2004). For statutory language to be ambiguous, however, it must be susceptible to more than one reasonable interpretation or more than one accepted meaning. *Id.* at 519. Where "the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

The language of 18 U.S.C. § 2259 reflects a broad restitutionary purpose. *See United States v. Laney*, 189 F.3d 954, 966 (9th Cir. 1999) ("Section 2259 is phrased in generous terms, in order to compensate the victims of sexual abuse for the care required to address the long term effects of their abuse."); *United States v. Crandon*, 173 F.3d 122, 126 (3d Cir. 1999) ("Congress [in § 2259] mandated broad restitution for a minor victim."). Section 2259(a) mandates that district courts "shall order restitution for any offense under this chapter," including the offense to which Paroline and Wright pled guilty, 18 U.S.C. § 2252. Section 2259(b)(1) specifies that a restitution order "shall direct the defendant to pay the victim . . . the full amount of the victim's losses."[7]

Section 2259(b)(3) defines the term "the full amount of the victim's losses," contained in § 2259(b)(1), as

> [A]ny costs incurred by the victim for–
> (A) medical services relating to physical, psychiatric, or psychological care;
> (B) physical and occupational therapy or rehabilitation;
> (C) necessary transportation, temporary housing, and child care expenses;
> (D) lost income;
> (E) attorneys' fees, as well as other costs incurred; and
> (F) any other losses suffered by the victim as a proximate result of the offense.

Section 2259(b)(4) reinforces that "[t]he issuance of a restitution order under this section is mandatory," *id.* § 2259(b)(4)(A), and instructs that "[a] court may not decline to issue an order under this section because of–(i) the economic circumstances of the defendant; or (ii) the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or

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[7] A "victim" is an "individual harmed as a result of a commission of a crime under this chapter." *Id.* § 2259(c).

any other source." *Id.* § 2259(b)(4)(B). To guide the district courts in awarding restitution, § 2259(b)(2) instructs courts to issue and enforce restitution orders "in accordance with section 3664 and in the same manner as an order under 3663A."

B

The district court in *Paroline* rejected Amy's argument that § 2259 requires an award of "the full amount of [her] losses." Instead, resorting to the Supreme Court's decision in *Porto Rico Railway, Light & Power Co. v. Mor*, 253 U.S. 345, 348 (1920), which explained that "[w]hen several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all," the district court extended the "proximate result" language contained in § 2259(b)(3)(F) to apply to the losses described in subsections (A) through (E). *See Paroline*, 672 F. Supp. 2d at 788 (also citing *Fed. Mar. Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 734 (1973)). In construing the statute, the district court expressed its concern that "a restitution order under section 2259 that is not limited to losses proximately caused by the defendant's conduct would under most facts, including these, violate the Eighth Amendment," *id.* at 789, and that an alternative "interpretation would be plainly inconsistent with how the principles of restitution and causation have historically been applied." *Id.* at 790. In reversing the district court's holding, the *Amy* panel rejected a generalized proximate cause requirement and stressed that the causation requirement in the definition of "victim," together with § 3664's mechanism for joint and several liability, surmounts any Eighth Amendment concerns. *See Amy*, 636 F.3d at 200–01.

Unlike the district court in *Paroline*, the *Wright* district court seemed to accept Amy's argument to a limited degree, as it awarded all of the restitution she requested for her future treatment and counseling, and the costs of her expert witness fees. Although the *Wright* panel accepted *Amy*'s holding as binding precedent in reviewing the district court's restitution award, *Wright*'s special concurrence, tracing the reasoning of the district court in *Amy* and challenging the panel's decision not to limit § 2259 to damages proximately caused by a defendant's criminal actions, presaged this en banc rehearing. *See Wright*, 639 F.3d at 686–89 (Davis, J., specially concurring).

In this en banc rehearing, Amy maintains that § 2259 is a mandatory statute requiring district courts to award full restitution to victims of child pornography. In her view, the plain language of the statute dictates that the proximate result language in § 2259(b)(3)(F) is limited to that category of losses and does not apply to the categories of losses described in § 2259(b)(3)(A)–(E).

The Government contends that § 2259(b)(3) conditions all of a victim's recoverable losses on a showing that those losses proximately resulted from the offense. Drawing on *Porto Rico Railway*, the Government asserts that the statutory text reflects Congress' intent to condition all recoverable losses on a showing of proximate cause. Without citing to precedent, the Government urges us "to presume that Congress adhered to the usual balance in the law of remedies: to hold defendants fully accountable for the losses associated with their conduct but in a manner that respects the deeply-rooted principle of proximate causation." The Government further asserts that there is nothing absurd in the conclusion that Congress intended this limiting principle to apply to all categories of losses. Invoking a recent Supreme Court case analyzing civil tort liability under the Federal Employers' Liability Act in support of this proposition, the Government reasons that "the very purpose of a proximate-

cause limitation is to prevent infinite liability." *See CSX Transp., Inc., v. McBride*, 131 S. Ct. 2630, 2642 (2011). The Government advises the court not to delve into legislative materials and also stresses that seven circuits have rejected Amy's reading of the statute.

Paroline similarly construes the "proximate result" language in the statute and relies on the construction of other restitution statutes to support his position. Both Paroline and Wright draw on legislative materials to assert that in drafting § 2259, Congress intended to incorporate a proximate cause requirement.[8]

C

1

Our plain reading of § 2259 leads us to the following conclusion: Once a district court determines that a person is a victim, that is, an "individual harmed as a result of a commission of a crime" under the chapter that relates to the sexual exploitation and abuse of children, § 2259 requires the district court to order restitution for that victim. *See* 18 U.S.C. § 2259(a),(b)(4)(A),(c). The restitution order that follows must encompass "the full amount of the victim's losses." *Id.* § 2259(b)(1). Those losses include five categories of specific losses—medical services related to physical, psychiatric, or psychological care; physical and occupational therapy or rehabilitation; necessary transportation, temporary housing, and childcare expenses; lost income; and attorney's fees and costs—and one category of "other losses suffered by the victim as a proximate result of the offense." *Id.* § 2259(b)(3). The rule of the last antecedent, recently applied by the Supreme Court in *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003),

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[8] Of course, we cannot consult these materials unless we conclude that § 2259's text is ambiguous. *See Carrieri*, 393 F.3d at 518–19. Even if we were to consult these materials, they are inconclusive at best.

instructs that "a limiting clause or phrase," such as the "proximate result" phrase in § 2259(b)(3)(F), "should ordinarily be read as modifying only the noun or phrase that it immediately follows." "[T]his rule is not an absolute and can assuredly be overcome by other indicia of meaning," but "construing a statute in accord with the rule is 'quite sensible as a matter of grammar.'" *Id.* (quoting *Nobelman v. Am. Sav. Bank*, 508 U.S. 324, 330 (1993)); *accord* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 144 (2012) ("This rule is the legal expression of a commonsense principle of grammar").

The structure and language of § 2259(b)(3) limit the phrase "suffered by the victim as a proximate result of the offense" in § 2259(b)(3)(F) to the miscellaneous "other losses" contained in that subsection. We see no "other indicia of meaning" in the statute to suggest that the rule of the last antecedent does not apply here. *See id.* Despite the clear terms of the statute, other courts and the parties before us raise arguments in favor of a generalized proximate cause requirement based on (a) canons of statutory construction, (b) traditional causation principles, and (c) possible absurd results. We address—and dismiss—each in turn.

a

First, the Government, Paroline, Wright, and Judge Davis's dissenting opinion press the importance of *Porto Rico Railway* and other caselaw relied on by the district court. As did the *Amy* panel, however, we doubt *Porto Rico Railway*'s applicability here. *Porto Rico Railway* concerned the following statute: "Said District Court shall have jurisdiction of all controversies where all of the parties on either side of the controversy are citizens or subjects of a foreign state or states, or citizens of a state, territory, or district of the United States not domiciled in Porto Rico . . . ." *Porto Rico Ry.*, 253 U.S. at 346. The Supreme

Court read the words, "not domiciled in Porto Rico," to apply equally to "citizens or subjects of a foreign state or states" and "citizens of a state, territory, or district of the United States." *Id.* at 348. The Supreme Court explained,"When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." *Id.* at 348.

Deprived of its context, *Porto Rico Railway*'s rule can be contorted to support the statutory interpretation urged by the Government and apply the "proximate result" language in § 2259(b)(3)(F) to the five categories of loss that precede it. But applying that rule here to require generalized proximate cause would disregard that the list in *Porto Rico Railway*'s statute is significantly different than the one central to this appeal. The statute analyzed in *Porto Rico Railway* featured a long sentence, unbroken by numbers, letters, or bullets, with two complex noun phrases sandwiching the conjunction "or," with the modifier "domiciled in Porto Rico" following the conjoined phrases. The structure of the sentence required the reading the Supreme Court gave it; the phrase "domiciled in Porto Rico" modified the nouns at the head of the two phrases, "citizens or subjects" and "citizens." The Supreme Court expressed its concern that a different construction would have left the reader with a fragmented phrase, which would be overly broad in application, and which, in turn, would have failed to satisfy the statute's overarching purpose to curtail federal courts' jurisdiction. *See Porto Rico Ry.*, 253 U.S. at 348.

Section 2259, in contrast, begins with an introductory phrase composed of a noun and verb ("'full amount of the victim's losses' includes any costs incurred by the victim for—") that feeds into a list of six items, each of which are independent objects that complete the phrase. Only the last of these items contains the limiting language "proximate result." A double-dash opens the list,

and semi-colons separate each of its elements, leaving § 2259(b)(3) with a divided grammatical structure that does not resemble the statute in *Porto Rico Railway*, with its flowing sentence that lacks any distinct separations. Of course, we do not sit "as a panel of grammarians," *Flora*, 362 U.S. at 150, but we cannot ignore that "the meaning of a statute will typically heed the commands of its punctuation." *Bank of Or.*, 508 U.S. at 454. The structural and grammatical differences between § 2259 and the statute in *Porto Rico Railway* forcefully counsel against applying *Porto Rico Railway* to the current statute to reach the *Paroline* district court's reading.[9]

Seatrain, the other case relied on by the district court, is similarly inapplicable. *See Seatrain*, 411 U.S. at 726. *Seatrain* analyzed a federal antitrust statute that included a seven-category list. *Id.* at 732. All items on the list but the third referred to ongoing activity; the seventh category was a catchall category phrased as "or in any manner providing for an exclusive, preferential, or cooperative working arrangement." *Id.* at 732–33. The Government urged the Supreme Court to construe this third category as concerning a one-time activity. *Id.* at 732. The Court rejected that argument because a broad reading of the statute would conflict with the legal principle that antitrust laws are strictly construed. *Id.* at 733. To aid in a narrow construction of the statute, the Court applied the rule of statutory construction that "[catchall] clauses are to be read as bringing within a statute categories similar in type to those specifically

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[9] Further, *Porto Rico Railway* also commands that where the statute in question "manifests a general purpose . . . [and] the application of the clause were doubtful, we should so construe the provision as to effectuate the general purpose of Congress." 253 U.S. at 348. The grammar of § 2259, viewed in light of § 2259's broad restitutionary purpose as expressed by its plain terms, confirms that our reading is correct. *See Crandon*, 173 F.3d at 126 ("Congress [in § 2259] mandated broad restitution for a minor victim."); *Laney*, 189 F.3d at 966 ("Section 2259 is phrased in generous terms, in order to compensate the victims of sexual abuse for the care required to address the long term effects of their abuse.").

enumerated" and concluded that the last catchall phrase indicated that Congress intended all the activities to penalize only ongoing antitrust activities. *Id.* at 734 (citing 2 J. SUTHERLAND, STATUTES & STATUTORY CONSTRUCTION § 4908 *et seq.* (3d ed. 1943)). Here, we do not face a statutory scheme that requires narrow construction. *See Crandon*, 173 F.3d at 126; *Laney*, 189 F.3d at 966. *Seatrain*'s weight in interpreting § 2259 is questionable at best.

Seatrain's rule is at odds with the rule of last antecedent on which we rely; the rule of last antecedent, moreover, provides a reading faithful to § 2259's broad restitutionary purpose. To illustrate, in *Barnhart v. Thomas*, the Supreme Court reviewed an agency's interpretation of a statute that states

> An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do *his previous work* but cannot, considering his age, education, and work experience, engage in *any other kind of substantial gainful work* which exists in the national economy.

Barnhart, 540 U.S. at 23 (emphases added). Applying the rule of the last antecedent, the Supreme Court held that the words "which exists in the national economy" referred only to the noun "any other kind of substantial gainful work" and not to the noun "his previous work." *Id.* at 24–27. In support of this holding, the Supreme Court reasoned that the words "any other" in the second phrase did not show the "contrary intention" necessary to overcome the rule of the last antecedent to apply that phrase to the first. *Id.* at 27–28.

The Supreme Court also applied the rule of last antecedent in *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335 (2005) to a statute that included a complete sentence that fed into a seven-category list. Each category on the list was punctuated with a period; only the last category on the list

contained a limiting clause. *Id.* at 340. Drawing on the grammatical structure of the list, the Supreme Court concluded that applying the limiting clause to the other items in the list "stretches the modifier too far."[10] *Id.* at 343.

As we have already explained, the grammatical structure of § 2259(b)(3) reflects the intent to read each category of loss separate from the one that preceded it and limit the application of the "proximate result" language in § 2259(b)(3)(F). Comparing the Supreme Court's more recent articulations of the rule of the last antecedent in *Barnhart* and *Jama* to the older rules of statutory construction expressed in *Porto Rico Railway* and *Seatrain* confirms that application of the rule of the last antecedent to limit the proximate result language to the subsection in which it is contained makes more sense here. *See*

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[10] In *Barnhart*, Justice Scalia provided an example of application of this rule in ordinary life that reveals the commonsensical aspect of the error in applying the proximate result language of § 2259(b)(3)(F) to the five categories of losses that precede it:

> Consider, for example, the case of parents who, before leaving their teenage son alone in the house for the weekend, warn him, "You will be punished if you throw a party or engage in any other activity that damages the house." If the son nevertheless throws a party and is caught, he should hardly be able to avoid punishment by arguing that the house was not damaged. The parents proscribed (1) a party, and (2) any other activity that damages the house. As far as appears from what they said, their reasons for prohibiting the home-alone party may have had nothing to do with damage to the house-for instance, the risk that underage drinking or sexual activity would occur. And even if their only concern was to prevent damage, it does not follow from the fact that the same interest underlay both the specific and the general prohibition that proof of impairment of that interest is required for both. The parents, foreseeing that assessment of whether an activity had in fact "damaged" the house could be disputed by their son, might have wished to preclude all argument by specifying and categorically prohibiting the one activity-hosting a party-that was most likely to cause damage and most likely to occur.

450 U.S. at 27–28.

id. at 26. Applying the proximate result language of § 2259(b)(3)(F) to the categories that precede it would "stretch[] the modifier too far" and disregard the structure of § 2259(b)(3) as written. *Jama*, 543 U.S. at 343.

At least three circuits agree that under rules of statutory construction, we cannot read the "proximate result" language in § 2259(b)(3)(F) as applying to the categories of losses in § 2259(b)(3)(A)–(E).[11] *See United States v. Burgess*, 684 F.3d 445, 456–57 (4th Cir. 2012); *United States v. Aumais*, 656 F.3d 147, 153 (2d Cir. 2011); *United States v. Monzel*, 641 F.3d 528, 535 (D.C. Cir.), *cert. denied*, *Amy, Victim in Misty Child Pornography Series v. Monzel*, 132 S.Ct. 756 (2011). But we do not ignore that other circuits have used tools of statutory construction to conclude that the proximate result language in § 2259(b)(3)(F) applies to the five categories of loss that preceded it.[12] *See United States v. McDaniel*, 631 F.3d 1204, 1208–09 (11th Cir. 2011); *United States v. Laney*, 189 F.3d 954, 965 (9th Cir. 1999). These circuits, however, reached this conclusion for reasons we do not find compelling. The Eleventh Circuit, for example, applied *Porto Rico*

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[11] These circuits, whose approach we discuss later in this opinion, nevertheless inject the statute with a proximate cause requirement through alternative means. *See Monzel*, 641 F.3d at 535; *Aumais*, 656 F.3d at 153.

[12] This disagreement does not mean that our plain-meaning analysis is fraught with any ambiguity. This court considers a statute ambiguous when a statute is subject to more than one reasonable interpretation or more than one accepted meaning. *See Carrieri*, 393 F.3d at 518–19. Even though we choose a course that differs from that of our sister circuits, a division of judicial authority is not enough to render a statute ambiguous. *See Reno v. Koray*, 515 U.S. 50, 64–65 (1995) (discussing this principle in context of rule of lenity). Any "seeming agreement on a standard [in our sister circuits] suggests more harmony than there is." *United States v. Kearney*, 672 F.3d 81, 96 (1st Cir. 2012). The First Circuit has correctly observed that the various circuits have applied a proximate cause test to similar, if not identical facts, yet reached differing outcomes that "cannot be entirely explained by differences in the facts of record." *See id. Compare Monzel*, 641 F.3d at 537–40 (concluding that proximate cause shown but remanding to determine the amount of harm so caused) and *McDaniel*, 631 F.3d at 1209 (holding that the district court did not clearly err in finding proximate cause) *with McGarity*, 669 F.3d at 1267–70 (concluding that proximate cause was not established), *Aumais*, 656 F.3d at 154–55 (same), and *Kennedy*, 643 F.3d at 1263–65 (same).

Railway's rule without accounting for the Supreme Court's application of it. *See* § IV-C-1-a *supra* (exposing the fault in relying on the rule of *Porto Rico Railway*). The Ninth Circuit, moreover, read the "as a result of" language in § 2259's definition of victim together with the "proximate result" language in § 2259(b)(3)(F) to infuse all of § 2259(b)(3) with a proximate cause requirement. *See Laney*, 189 F.3d at 965. Without more in the statute to support that analysis, we cannot accept the Ninth Circuit's conclusion. To do so would contradict the statute's plain terms and be tantamount to judicial redrafting. *See United States v. Naftalin*, 441 U.S. 768, 773 (1979) ("The short answer is that Congress did not write the statute that way."). The rules of statutory construction, properly applied, cannot be used to extend the proximate result language contained in § 2259(b)(3)(F) to the categories of losses preceding it.[13]

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[13] The dissenting opinion authored by Judge Davis criticizes the majority analysis's inconsistency with *Porto Rico Railway*. Like the Eleventh Circuit, however, Judge Davis's dissent fails to properly account for the statute in that opinion and § 2259's significantly differing contexts. Like the Ninth Circuit, this dissenting opinion attempts to cloak the entire statute with a proximate causation requirement with only scant and scattered causal language as support; the dissenting opinion also resorts to language that applies to the procedures with which restitution is issued and enforced within § 3664 to improperly bolster its position. While making the same errors as our sister circuits, the dissenting opinion does not explain why the rule of last antecedent does not apply. Its position is ultimately unpersuasive.

Judge Southwick's dissenting opinion does not agree with Judge Davis's analysis, but it would similarly resort to the language of § 3664 and § 3663A to require proximate causation. The dissenting opinions are correct that § 2259 directs that "[a]n order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A." Judge Southwick's dissenting opinion construes this language to require application of § 3663A's definition of victim as "a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered." Congress' directive to rely on the procedures guiding issuance and enforcement of a restitution order, however, does not require us to rely on the substantive definition of "victim" contained in a separate statute when § 2259 has already supplied courts with a different, broader definition of victim.

Lastly, Judge Davis's dissenting opinion claims that under our holding, "if Amy were injured in an automobile accident on the way to a counseling session, those damages would be

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Next, we consider the Government's assertion that principles of tort liability limit the award of restitution under § 2259 to losses proximately caused by a defendant's criminal actions. At least three of our sister circuits have accepted this view and derived a proximate cause requirement not from "the catch-all provision of § 2259(b)(3)(F), but rather [from] traditional principles of tort and criminal law and [from] § 2259(c)'s definition of 'victim' as an individual harmed 'as a result' of the defendant's offense." *Monzel*, 641 F.3d at 535; *accord Burgess*, 2012 WL 2821069, at *10; *Aumais*, 656 F.3d at 153; *see Kearney*, 672 F.3d at 96–97 ("It is clear to us that Congress intended some causal link between the losses and the offense to support the mandated restitution."); *United States v. Evers*, 669 F.3d 645, 659 (6th Cir. 2012) (adopting a proximate cause requirement but declining to decide between the two approaches of our sister circuits).

In *United States v. Monzel*, a case that has served as a springboard for other circuits evaluating § 2259, the D.C. Circuit explained that "[i]t is a bedrock rule of both tort and criminal law that a defendant is only liable for harms he proximately caused," and "a restitution statute [presumably] incorporates the traditional requirement of proximate cause unless there is good reason to think Congress intended the requirement not to apply." *Monzel*, 641 F.3d at 535–36 (footnote omitted) (citing WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 6.4,

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included in a restitution award." This is not what the majority opinion suggests. Rather, the majority refuses to artificially divide responsibility for a crime victim's losses in circumstances like these here, where multiple defendants are realistically responsible for the victim's indivisible injury. While the dissent attempts to correct this error by adopting a collective causation theory, in doing so, it resorts to an unnecessary source in order to graft upon the clearly-worded statute a causation requirement. Ultimately the dissenting opinion's errors arises from its confusion of the "victim" inquiry which is antecedent to the calculation of "total losses."

at 464, 471 (2d ed. 2003). The D.C. court posited that "[a]lthough § 2259 is a criminal statute, it functions much like a tort statute by directing the court to make a victim whole for losses caused by the responsible party," *see id.* at 536 n.5, and found nothing in the text of § 2259 indicating Congress' intent to eliminate "the ordinary requirement of proximate cause." *Id.* at 536. Rather, "[b]y defining 'victim' as a person harmed 'as a result of' the defendant's offense,'" the court inferred that "the statute invokes the standard rule that a defendant is liable only for harms that he proximately caused." *Id.* The D.C. Circuit worried that without such a limitation, "liability would attach to all sorts of injuries a defendant might indirectly cause, no matter how 'remote' or tenuous the causal connection." *Id.* at 537.

The D.C. Circuit rejected the view expressed by the *In re Amy Unknown* panel, explaining that "[h]ad Congress meant to abrogate the traditional requirement for everything but the catch-all, surely it would have found a clearer way of doing so." *Id.* at 536–37. The D.C. Circuit criticized this court's decision in *Amy* because "a 'general' causation requirement without a subsidiary proximate causation requirement is hardly a requirement at all"; "[s]o long as the victim's injury would not have occurred but for the defendant's offense, the defendant would be liable for the injury." *Id.* at 537 n.8. The circuits that have adopted the D.C. Circuit's view have pursued a similar line of reasoning. We do not accept this reasoning, however, and refuse to inject the statute with a proximate cause requirement based on traditional principles of liability.

The Supreme Court has explained that we "ordinarily" should "resist reading words or elements into a statute that do not appear on its face." *Bates*, 522 U.S. at 29. But the Supreme Court has also explained that the absence of certain language in a statute does not necessarily mean that Congress intended

courts to disregard traditional background principles. *See U.S. Gypsum Co.*, 438 U.S. at 437. To illustrate, with respect to the question of intent in the criminal provisions of the Sherman Act, the Supreme Court has explained that

> "[M]ere omission . . . of intent [in the statute] will not be construed as eliminating that element from the crimes denounced"; instead Congress will be presumed to have legislated against the background of our traditional legal concepts which render intent a critical factor, and "absence of contrary direction [will] be taken as satisfaction with widely accepted definitions, not as a departure from them."

Id. at 437 (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952)). In interpreting the omission of intent in a different statute, the Supreme Court cautioned that "far more than the simple omission of the appropriate phrase from the statutory definition [of the offense] is necessary to justify dispensing with" a mens rea requirement. *Liparota v. United States*, 471 U.S. 419, 426 (1985) (quoting *U.S. Gypsum*, 438 U.S. at 438); *see id.* ("[T]he failure of Congress explicitly and unambiguously to indicate whether mens rea is required does not signal a departure from this background assumption of our criminal law.").

With these principles in mind, the D.C. Circuit's analysis, which infuses § 2259 with a generalized proximate cause requirement, *see Monzel*, 641 F.3d at 535, could comport with the Supreme Court's interpretative guidance—only if § 2259 were naked of causal limitations. *See U.S. Gypsum Co.*, 438 U.S. at 437. But it is not. In assessing whether Congress intended a broad proximate cause limitation, we cannot ignore that § 2259 expresses causal requirements, yet isolates them to two discrete points: the definition of victim as an "individual harmed *as a result of* a commission of a crime," and the limitation of "any other losses" to those that are the "*proximate result* of the offense." *See* 18 U.S.C. § 2259(b),(c) (emphases added). Had Congress omitted all causal language and not

required award of the full amount of losses, or positioned the proximate result language so that it would apply to all categories of losses, we could consider the possibility that Congress intended to bind all categories of losses with a proximate cause requirement. Instead, Congress resisted using the phrase "proximate cause" anywhere in § 2259, including § 2259(b)(3)(F) and further required the court to order the "full amount of the victim's losses."[14] *See id.* The selective inclusion and omission of causal requirements in § 2259's subsections, together with language pointing away from ordinary causation, suggest that Congress intended to depart from, rather than incorporate, a tradition of generalized proximate cause.

This interpretation does not render the statute unworkable. The problem seeming to animate the cases in other circuits interpreting § 2259 to require proximate cause is how to allocate responsibility for a victim's harm to any single defendant. *See Burgess*, 2012 WL 2821069, at *12; *Aumais*, 656 F.3d at 153–54; *Kennedy*, 643 F.3d at 1265–66; *Monzel*, 641 F.3d at 537–40. These courts ignore, however, that deciding that a defendant "must pay restitution for the losses he caused (whether proximately or not)," does not resolve how the court "determines how those losses should be allocated in cases where more than one offender caused them"—injecting the statute with traditional proximate causation limitations takes courts no closer to determining what each defendant must pay or to supplying crime victims with the "full amount of [their] losses." *Burgess*, 2012 WL 2821069, at *14 (Gregory, J., concurring in part, dissenting in part, and concurring in judgment) ("The question of whether a defendant

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[14] In stark contrast, other restitution statutes contain more forceful causation requirements that are lacking in § 2259. *Compare* 18 U.S.C. § 3663A(a)(2) (explaining that a victim is "a person directly and proximately harmed as a result of the commission of an offense") *with id.* § 2259(c) (defining a victim as "the individual harmed as a result of a commission of a crime").

proximately caused some injury is entirely separate from the question of how those proximately caused losses should be allocated among several offenders."). By focusing on the question of proximate cause, our sister circuits have not made § 2259 any easier to apply and seemingly have ignored that § 2259 has armed courts with tools to award restitution because it instructs courts to refer to the standards under § 3664.[15] *See id.* § 2259(b)(2) ("An order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A.").

Section 3664 instructs that courts may enforce a restitution order "by all other available and reasonable means," *id.* § 3664(m)(1)(A)(ii), and offers a "means" to aid courts in awarding restitution in a way that would ensure that Amy receives the full amount of her losses, to the extent possible, while also ensuring that no defendant bears more responsibility than is required for full restitution: joint and several liability. Where "the court finds more than 1 defendant has contributed to the loss of a victim," § 3664(h) instructs that "the court may make each defendant liable for payment of the full amount of

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[15] Any possible difficulty in ordering restitution in these cases arises not from the statutory construction, but from the type of crime underlying these appeals. It is quite possible that no other crime is like the crime of distribution, receipt, and possession of child pornography punishable under § 2252: No other crime involves single victims harmed jointly by defendants acting independently in the country. *See Burgess*, 2012 WL 2821069, at *13 (Gregory, J., concurring in part, dissenting in part, and concurring in judgment) (discussing the indivisibility of the injury to victims of child pornography crimes). Yet, the unique factual scenario that undergirds the application of this restitution statute need not muddle our analysis. We cannot interpret this statute to reach a result unsupported by its plain terms. *See Germain*, 503 U.S. at 254 (quoting *Rubin*, 449 U.S. at 430) (explaining that where "the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'"); *see also In re Amy*, 591 F.3d at 797 (Dennis, J., dissenting) ("Congress intended to afford child victims ample and generous protection and restitution, not to invite judge-made limitations patently at odds with the purpose of the legislation.").

restitution."[16] The joint and several liability mechanism applies well in these circumstances, where victims like Amy are harmed by defendants acting separately who have caused her a single harm.[17] *See Burgess*, 2012 WL 2821069, at *13 (Gregory, J., concurring in part, dissenting in part, and concurring in judgment) (explaining that the joint and several liability described in § 3664

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[16] As Judge Davis's dissenting opinion points out, § 3664(h) fully reads:

> If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution *or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant.*

(emphasis added).

Judge Davis's dissenting opinion would read the italicized portion of 3664(h) to allow district courts the discretion to circumvent § 2259's command to award a crime victim the full amount of his or her losses. Thus, § 2259 dictates that the circumstances underlying child pornography convictions under § 2252 do not permit division of liability for reasons this opinion has already explained; the injury victims like Amy suffer does not produce a loss capable of division. *See* note 14 *supra*. We echo the criticism of this approach embodied in Judge Southwick's dissenting opinion:

> In light of the unique nature of prosecutions of child pornography and the clear congressional intent to maximize awards, any doubts about the proper amount of restitution should be resolved in favor of the child. . . . I am concerned that [Judge Davis's] emphasis on the discretion of a district court . . . tends towards accepting inappropriately low, even nominal awards. I would not accept that a forward-looking estimate of the number of future defendants and awards should be used to estimate a percentage of overall liability to be given a particular defendant. That puts too much weight on the interests of the defendants. Over-compensation is an unlikely eventuality.

[17] Writing separately in the Fourth Circuit's recent opinion analyzing § 2259, Judge Gregory explained the indivisibility of pornography victims' harms:

> If [a defendant] proximately caused [a victim like Amy]'s psychological injury, this injury is indivisible from the psychological injuries proximately caused by the other offenders. I do not believe a fact finder could meaningfully say precisely *x* amount of [the victim]'s psychological injuries were caused by [the defendant]'s watching the same video.

Burgess, 2012 WL 2821069, at *13 (Gregory, J., concurring in part, dissenting in part, and concurring in judgment).

"'has long been available . . . in which two negligent actors, acting independently of one another, caused by a single indivisible harm to the plaintiff.'" (quoting TORT LAW: RESPONSIBILITIES AND REDRESS 517 (John C.P. Goldberg et al. eds., 2008)). And although the D.C. Circuit has expressed that it is "unclear . . . whether joint and several liability may be imposed upon defendants in separate cases," *Monzel*, 641 F.3d at 539, nothing in § 3664 forbids it, either expressly or through implication; the fact that it conforms well to this context supports its application.

Any fears that Amy and victims like her might be overcompensated through the use of joint and several liability, as expressed under § 3664(h), are unwarranted. *See, e.g.*, *Burgess*, 2012 WL 2821069, at * 11 ("While full compensation would be unlikely from any individual defendant, [the victim's] proposed interpretation of the restitution statute places no cap on her ultimate recovery, and would allow her to recover the amount of her losses many times over."). The use of joint and several liability does not mean that Amy may "recover more than her total loss: [rather,] once she collects the full amount of her losses from one defendant, she can no longer recover from any other." *Id.* at *14 (Gregory, J., concurring in part, dissenting in part, & concurring in judgment) (quoting TORT LAW, *supra*, at 517).

Section 3664 provides "reasonable means" to defend against any theoretical overcompensation that could result. *See* 18 U.S.C. § 3664(m)(1)(A)(ii). First, if Amy recovers the full amount of her losses from defendants, the Government and defendant may use this information to ensure that Amy does not seek further awards of restitution. *See id.* § 3664(e) (explaining that the court may resolve "[a]ny dispute as to the proper amount or type of restitution . . . by the preponderance of the evidence."). Second, § 3664(k) suggests a means for ending defendants' existing joint and several restitution

obligations once Amy receives the full amount of her losses; it allows for a district court, "on its own motion, or the motion of any party, including the victim, [to] adjust the payment schedule, or require immediate payment in full, as the interests of justice require." This broadly phrased subsection seems to enable courts to apply joint and several liability across jurisdictions because it permits those courts to adjust restitution orders as victims receive the full amount of their losses.[18] More concretely, if Amy one day receives the full amount of restitution representing the "full amount of [her] losses" under § 2259, district courts across the nation may amend the judgments of defendants to reflect this fact under § 3664(k) by terminating further restitution obligations.[19]

In either circumstance, district courts must be in possession of evidence to support entry of restitution or amendment of the defendants' judgments. There are several potential sources of this information. Victims, of course, are in the best position to know what restitution they have recovered and what restitution they have yet to receive. In addition to information obtained from victims, the Government may rely on information maintained by the probation office and other arms of the U.S. Department of Justice to ensure that amounts

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[18] Use of this mechanism does not violate § 3664(f)(1)(B)'s command that courts may not consider a victim's receipt of compensation from other sources "in determining the amount of restitution" because § 2259 limits a victim's recovery to the full amount of his or her losses. Section 2259(b)(4)(B)'s similar instruction that a court may not decline to issue a restitution order "because of . . . the fact that a victim has, or is entitled to, receive compensation for his or her injuries from . . . any other source" reinforces this conclusion. Section 2259(b)(4)(B), read together with § 3664(b)(f)(1)(B), reinforces the mandatory nature of § 2259 by disallowing district courts from declining to issue restitution to crime victims while simultaneously honoring the cap § 2259 places on victims' recovery: the full amount of a victim's losses.

[19] Of course, even while Amy may not collect more than to which she is entitled, she may certainly obtain judgments in excess of that amount. Indeed, Amy has already obtained judgments exceeding $3.4 million.

reported by a victim are accurate.[20] Defendants may dispute any amounts in these requests, and, under § 3664(e), the court may resolve "[a]ny dispute as to the proper amount or type of restitution . . . by the preponderance of the evidence."[21]

c

Next, the Government asserts that not restricting the recovery of losses by proximate cause produces an absurd result—constitutional implications that could be avoided if we were to read § 2259 as requiring proximate causation with respect to all categories of losses. *See Lamie*, 540 U.S. at 534 (instructing that courts must enforce a statute's terms so long as "the disposition required by the text is not absurd."). Specifically, the Government is concerned that without a proximate cause limitation, § 2259 could be challenged on the ground that it subjects a defendant to excessive punishment under the Eighth Amendment.

The Eighth Amendment prescribes that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The Government posits that by giving effect to the statute's plain text, this court could cause Eighth Amendment problems similar to that expressed by a recent Supreme Court case involving criminal forfeiture: Where criminal forfeiture "would be grossly disproportional to the gravity of [an] offense," the Supreme Court held that it would violate the Excessive Fines Clause of the Eighth Amendment. *United States v. Bajakajian*, 524 U.S. 321, 324 (1998).

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[20] The comprehensive information the Government has provided in this case regarding the restitution ordered in other cases involving Amy confirms the Government's access to this type of information.

[21] Nothing in § 2259, § 3664, or in this opinion is intended to restrict the district court's ability to use any other mechanisms available under § 3664 to order restitution in a manner that effects § 2259's purposes.

First, we are not persuaded that restitution is a punishment subject to the same Eighth Amendment limits as criminal forfeiture. Its purpose is remedial, not punitive. *See United States v. Webber*, 536 F.3d 584, 602–03 (7th Cir. 2008) ("Forfeiture and restitution are distinct remedies. Restitution is remedial in nature, and its goal is to restore the victim's loss. Forfeiture, in contrast, is punitive; it seeks to disgorge any profits that the offender realized from his illegal activity.") (citations omitted); *see also United States v. Taylor*, 582 F.3d 558, 566 (5th Cir. 2009) ("Restitution operates to make the victim of the crime whole."). Even so, restricting the "proximate result" language to the catchall category in which it appears does not open the door to grossly disproportionate restitution in a way that would violate the Eighth Amendment. Section 2259 contains discrete causal limitations that precede the restitutionary right; restitution thus is limited to losses arising out of a victim's injury. *See* 18 U.S.C. § 2259(c) (imposing general causation requirement on definition of victim). Furthermore, the mechanisms under § 3664, which have already been described, further allay any concerns as to over-punishment. Fears over excessive punishment are misplaced.

Any concern that individual defendants may bear a greater restitutionary burden than others convicted of possessing the same victim's images, moreover, does not implicate the Eighth Amendment or threaten to create an absurd result. *See Arledge*, 553 F.3d at 899. Restitution is not tied to the defendant's gain; rather "so long as the government proved that the victim suffered the actual loss that the defendant has been ordered to pay, the restitution is proportional." *Id.* Even where a district court selectively imposed restitution on one co-defendant and not another, this court has treated this seeming inequality as being "of no consequence." *See id.* (citing *United States v. Ingles*, 445 F.3d 830, 839 (5th Cir. 2006) (explaining that "a district court may consider the relative

degrees of responsibility of co-defendants in imposing restitution obligations and therefore, the simple fact that like punishment was not imposed on [the co-defendants] does not offend the constitution" (internal quotation marks and citations omitted)). Thus, the fact that some defendants will be held jointly and severally liable for the full amount of Amy's losses, while other defendants convicted of possessing Amy's images may not be (because, for example, the Government or Amy does not seek restitution from them) does not offend the Eighth Amendment. *See id.*

The court, moreover, can ameliorate the impact of joint and several liability on an individual defendant by establishing a payment schedule that corresponds to the defendant's ability to pay. *See, e.g.*, *United States v. Wright*, No. 09-CR-103, at 5 (E.D. La. Dec. 16, 2009) (explaining the payment of restitution "shall begin while the defendant is incarcerated [and u]pon release, any unpaid balance shall be paid at a rate of $200.00 per month" and further explaining that "[t]he payment is subject to increase or decrease, depending on the defendant's ability to pay."); *see also* 18 U.S.C. § 3664(e) ("The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant's dependents, shall be on the defendant.").

Ultimately, while the imposition of full restitution may appear harsh, it is not grossly disproportionate to the crime of receiving and possessing child pornography. *Cf. id.* at 899–900 (rejecting Eighth Amendment challenge to the imposition of full restitution, pursuant to joint and several liability, under Mandatory Victims Restitution Act, in context of mail fraud case). In light of restitution's remedial nature, § 2259's built-in causal requirements, and the mechanisms described under § 3664, we do not see any Eighth Amendment concerns here or any other absurd results that our plain reading produces.

Accordingly, we hold that § 2259 requires a district court to engage in a two-step inquiry to award restitution where it determines that § 2259 applies. First, the district court must determine whether a person seeking restitution is a crime victim under § 2259—that is, "the individual harmed as a result of a commission of a crime under this chapter." 18 U.S.C. § 2259(c). The Supreme Court has acknowledged that "[t]he distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children," *New York v. Ferber*, 458 U.S. 747, 759 (1982), and this court has elaborated that "children depicted in child pornography may be considered to be the victims of the crime of receiving child pornography." *United States v. Norris*, 159 F.3d 926, 929 (5th Cir. 1998). This logic applies with equal force to defendants who possess child pornography: By possessing, receiving, and distributing child pornography, defendants collectively create the demand that fuels the creation of the abusive images. Thus, where a defendant is convicted of possessing, receiving, or distributing child pornography, a person is a victim under this definition if the images the defendant possesses, receives, or distributes include those of that individual.

Second, the district court must ascertain the full amount of the victim's losses as defined under § 2259(b)(3)(A)–(F), limiting only § 2259(b)(3)(F) by the proximate result language contained in that subsection, and craft an order guided by the mechanisms described in § 3664, with a particular focus on its mechanism for joint and several liability.

IV

Having resolved this important issue of statutory interpretation, we apply our holding to Amy's mandamus and Wright's appeal.

A

Under our traditional mandamus inquiry, we will grant Amy's petition for mandamus if (1) she has no other adequate means to attain the desired relief; (2) she has demonstrated a clear and indisputable right to the issuance of a writ; and (3) in the exercise of our discretion, we are satisfied that the writ is appropriate in these circumstances. *See Dean*, 527 F.3d at 394. As the Supreme Court has noted, the "hurdles" limiting use of mandamus, "however demanding, are not insuperable." *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 381 (2004).

We easily conclude that the first prong is met. Because we have held that the CVRA limits crime victims' relief to the mandamus remedy, Amy has no other means for obtaining review of the district court's decision not to order restitution. *See supra* § II–A. We are also satisfied that a writ is appropriate in these circumstances: The CVRA expressly authorizes mandamus, 18 U.S.C. § 3771(d)(3), and awarding restitution would satisfy § 2259's broad restitutionary purpose. Next, we conclude that Amy has a "clear and indisputable" right to restitution in light of our holding today. First, Amy is a "victim" under § 2259(c). Paroline possessed at least two of her images, and his possession of those images partly formed the basis of his conviction. *See Ferber*, 458 U.S. at 759; *Norris*, 159 F.3d at 929. Amy, as an "individual harmed as a result of [Paroline's] commission of a crime" falling within § 2259's scope, is thus a victim under § 2259. *See Kearney*, 672 F.3d at 94 ("Any argument that [Amy] has not suffered harm as a result of [Paroline's] crimes defies both fact and law."). Because Amy is a victim, § 2259 required the district court to award her restitution for the "full amount of [her] losses" as defined under § 2259(b)(3). Because the district court awarded Amy nothing, it therefore clearly and indisputably erred. No matter what discretion the district court possessed and no matter how

confounding the district court found § 2259, it was not free to leave Amy with nothing.

On remand, the district court must enter a restitution order reflecting the "full amount of [Amy's] losses" in light of our holdings today.

B

Turning to Wright's appeal, Amy is eligible for restitution as a "victim" of Wright's crime of possessing images of her abuse for the same reasons she is eligible as a victim of Paroline's crime. *See supra* § IV-A. It was therefore legal for the district court to order restitution to Amy. *See Arledge*, 553 F.3d at 897 (reviewing the legality of the restitution order de novo). As such, Wright's appeal necessarily focuses on the amount of the district court's restitution award, which we review for an abuse of discretion. *Id.* The district court awarded Amy $529,661 by adding Amy's estimated future counseling costs to the value of her expert witness fees. The district court did not explain why Wright should not be required to pay for any of the other losses Amy requested, and the record does not otherwise disclose why the district court reduced the Government's full request on Amy's behalf. While the district court erred in failing to award Amy the full amount of her losses, because the Government did not appeal Wright's sentence and Amy did not seek mandamus review, under *Greenlaw v. United States*, we must affirm Wright's sentence. 554 U.S. 237, 246 (2008) (holding appellate court may not increase sentence of defendant where Government did not appeal sentence directly or on cross-appeal).

V

For the reasons above, we reject the approach of our sister circuits and hold that § 2259 imposes no generalized proximate cause requirement before a child pornography victim may recover restitution from a defendant possessing images of her abuse. We AFFIRM the district court in *United States v. Wright*,

No. 09-CR-103 (E.D. La. Dec. 16, 2009). We VACATE the district court's judgment in *United States v. Paroline*, 672 F. Supp. 2d 781 (E.D. Tex. 2009), and REMAND for proceedings consistent with this opinion.[22]

[22] Amy's motion to strike portions of the Government's brief is DENIED.

DENNIS, Circuit Judge, concurring in part in the judgment.

I respectfully concur in the majority opinion's decision that the CVRA does not grant crime victims a right to a direct appeal from a district court's rejection of her claim for restitution under 18 U.S.C. § 2259; that the CVRA grants crime victims only a right to seek traditional mandamus review; and that the CVRA grants the government the right to seek mandamus and to retain its right to a direct appeal.

I further agree with the majority that neither the Government nor the victim is required to prove that the victim's losses defined by 18 U.S.C. § 2259(b)(3)(A)-(E) were a proximate result of the defendant's crime; it is only "any other loss suffered by the victim" that must be proved to be "a proximate result of the offense." *Id.* § 2259(b)(3)(F). Section 2259(c) defines "victim" as an "individual harmed as a result of a commission of a crime under this chapter," but it does not require a showing that the victim's losses included in § 2259(b)(3)(A)-(E) be a "proximate result of the offense." From this, I infer that the statute places only a slight burden on the victim or the government to show that the victim's losses or harms enumerated in those subsections plausibly resulted from the offense. Once that showing has been made, in my view, a presumption arises that those enumerated losses were the proximate result of the offense, which the defendant may rebut with sufficient relevant and admissible evidence.

Finally, I agree with the majority's conclusion that where a defendant is convicted of possessing child pornography, a person is a victim under the statute if the images include those of that individual. In these cases, I agree that the government and the victim have made a sufficient showing, unrebutted by the defendant, that the victim is entitled to restitution of losses falling under 18 U.S.C. § 2259 (b)(3)(A)-(E). Therefore, I concur in that part of the majority's

judgment that vacates the district courts' judgments and remands the cases to them for further proceedings.

In remanding, however, I would simply direct the district courts to proceed to issue and enforce the restitution orders in accordance with 18 U.S.C. § 3664 and 3663A, as required by § 2259(b)(2). Going forward, I believe it best to permit district courts to craft procedural and substantive devices for ordering restitution that would take into account both the mandatory nature of full restitution for crime victims under section 2259 and the mechanical difficulties of crafting orders given the possibility of multiplicitous liability among hundreds of defendants under circumstances that may change over time. While I admire the majority's effort to provide guidance to the district courts in their extremely difficult task of molding and merging these federal statutes, §§ 2259, 3663A, and 3664, into a legal, just, and predictable system, I believe that effort is premature in this court at this time on the present record. Rather, I would leave the decision as to how to proceed under these statutes to the district courts, which may decide to take additional evidence and require study and briefing by the parties to assist them in these difficult cases.

W. EUGENE DAVIS, Circuit Judge, concurring in part and dissenting in part, joined by KING, SMITH, and GRAVES, Circuit Judges.

I agree with my colleagues in the majority that we should grant mandamus in *In re Amy* and remand for entry of a restitution award.[1] I also agree that we should vacate the award entered in *Wright* and remand for further consideration on the amount of the award. The devil is in the details, however, and I disagree with most of the majority's analysis.

I disagree with my colleagues in the majority in two major respects:

1. Although I conclude that the proximate cause proof required by the restitution statutes can be satisfied in these cases, I disagree with the majority that the statute authorizes restitution without any proof that the violation proximately caused the victim's losses.
2. I agree with the majority that the district court must enter a restitution award against every offender convicted of possession of the victim's pornographic image; but I disagree with the majority that in cases such as these two, where the offenses of multiple violators contribute to the victim's damages, the district court must enter an award against each offender for the full amount of the victim's losses. No other circuit that has addressed this issue has adopted such a one size fits all rule for the restitution feature of the sentence of an offender. Other circuits have given the district courts discretion to assess the amount of the restitution the offender is ordered to pay. *See, e.g., United States v. Burgess*, 684 F.3d 445, 460

[1] Section 2259 directs courts to "order restitution for any offense under this chapter." District courts do not have discretion to make no award.

(4th Cir. 2012); *United States v. Kearney*, 672 F.3d 81, 100-01 (1st Cir. 2012); *United States v. McGarity*, 669 F.3d 1218, 1270 (11th Cir. 2012); *United States v. Laney*, 189 F.3d 954, 967 (9th Cir. 1999).

I.

THE STATUTES

At bottom, this is a statutory interpretation case, and I begin with a consideration of the structure and language of the statutes at issue that facially belie the majority's position that victims may be awarded restitution for losses not proximately caused by offense conduct. Section 2259 specifically governs mandatory restitution awards for crimes related to the sexual exploitation and abuse of children. A number of provisions in the statute make it clear that proof of a causal connection is required between the offenses and the victim's losses.

Section 2259(b)(2) expressly incorporates the general restitution procedures of 18 U.S.C. § 3664 and states that "[a]n order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A." Section 3664(e) states that "[t]he burden of demonstrating the *amount of the loss* sustained by a victim *as a result of the offense* shall be on the attorney for the Government." (emphasis added).

This language requiring proof of causation from § 3664(e) is consistent with the language defining "victim" found in § 2259(c), who is defined as "the individual harmed *as a result of* a commission of crime under this chapter . . . ." (emphasis added).

Section 2259(a) states that the court "shall order restitution for any offense under this chapter." Section 2259(b)(3) states that the victim's losses are defined as those suffered by the victim "as a proximate result of the offense." The full text of § 2259(b)(3) is as follows:

> [T]he term "full amount of the victim's losses" includes any costs incurred by the victim for –
>
> (A) medical services relating to physical, psychiatric, or psychological care;
> (B) physical and occupational therapy or rehabilitation;
> (C) necessary transportation, temporary housing, and child care expenses;
> (D) lost income;
> (E) attorneys' fees, as well as other costs incurred; and
> (F) any other losses suffered by the victim *as a proximate result of the offense.*

(emphasis added).

In interpreting this provision we should follow the fundamental canon of statutory construction established by the Supreme Court in *Porto Rico Railway, Light & Power Co. v. Mor*, 253 U.S. 345 (1920). In that case, the Court held that "[w]hen several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." *Id.* at 348. Applying this cardinal rule of statutory interpretation, I conclude that subsection (F)'s "as a proximate result of the offense" language applies equally to the previous five subcategories of losses, (A) through (E). This interpretation was accepted by the Eleventh Circuit in *United States v. McDaniel*, 631 F.3d 1204, 1209 (11th Cir. 2011) ("The phrase 'as a proximate result of the offense' is equally applicable to medical costs, lost income, and attorneys' fees as it is to 'any other losses.'" (citing *Porto Rico Ry.*, 253 U.S. at 348)); *see also Laney*, 189 F.3d at 965 (reading the "as a result of" language in § 2259's definition of victim together with the "proximate result" language in § 2259(b)(3)(F) to infuse all of 2259(b)(3) with a proximate cause requirement).

In contrast, the majority concludes that once the district court determines that a person is a victim (an individual harmed as a result of an offense under

§ 2259) the district court must order restitution without further proof of causation.[2]

The majority's reading of § 2259(b)(3) is patently inconsistent with the rule of statutory interpretation announced in *Porto Rico Railway*, which makes it clear that the clause should be read to apply to all categories of loss.[3] My conclusion that *Porto Rico Railway*'s rule of interpretation applies in this case is made even clearer when we consider the multiple references in the statutes discussed above expressly reflecting Congressional intent to require proof of causation.

The D.C. Circuit and other circuits have reached the same conclusion–that is, that § 2259 requires proof of proximate cause–albeit by a slightly different reasoning. *See United States v. Monzel*, 641 F.3d 528, 535-37 (D.C. Cir. 2011); *United States v. Aumais*, 656 F.3d 147, 153 (2d Cir. 2011); *Burgess*, 684 F.3d at 459. The D.C. Circuit explained that it is

> a bedrock rule of both tort and criminal law that a defendant is only liable for harms he proximately caused. ("An essential element of the plaintiff's cause of action for negligence, or . . . any other tort, is that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered. This connection usually is dealt with by the courts in terms of what is called 'proximate cause' . . . .").

---

[2] The majority would apparently hold that if Amy were injured in an automobile accident on the way to a counseling session, those damages would be included in a restitution award.

[3] I am not persuaded by *In re Amy*'s attempt to distinguish the statute in *Porto Rico Railway* on the basis that the subcategories of § 2259(b)(3) are separated by semicolons rather than commas. *See In re Amy*, 636 F.3d 190, 199 (5th Cir. 2011). Either punctuation device is an acceptable method of separating clauses. *See* BRYAN A. GARNER, THE REDBOOK: A MANUAL ON LEGAL STYLE 1-15 (2d. ed. 2006).

(footnote omitted) (citation omitted) (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 263 (5th ed. 1984)); *see also* WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 6.4, at 464 (2d ed. 2003) ("[For] crimes so defined as to require not merely conduct but also a specified result of conduct, the defendant's conduct must be the 'legal' or 'proximate' cause of the result."). "Thus, we will presume that a restitution statute incorporates the traditional requirement of proximate cause unless there is good reason to think Congress intended the requirement not to apply." *Monzel*, 641 F.3d at 536. The court found that "nothing in the text or structure of § 2259 leads us to conclude that Congress intended to negate the ordinary requirement of proximate cause." *Id.*

Other circuits have used different analyses but all circuits to confront this issue have interpreted the statute as using a proximate causation standard connecting the offense to the losses. *See United States v. Evers*, 669 F.3d 645, 658-59 (6th Cir. 2012) (finding a proximate cause requirement but declining to choose whether to adopt the *McDaniels* or *Monzel* rationale as they are "complementary"); *Kearney*, 672 F.3d at 96, 99 (adopting a proximate cause standard but not specifying under what analysis); *United States v. Crandon*, 173 F.3d 122, 125-26 (3d Cir. 1999) (stating, without analysis, that § 2259 requires damages for losses suffered "as a proximate result of the offense"). This circuit is the only circuit that has interpreted § 2259 and concluded that proximate cause is not required by the statute.

For the above reasons, I conclude that the statutes at issue require proof that the defendant's offense conduct proximately caused the victim's losses before a restitution award can be entered as part of the defendant's sentence.

II.

CAUSATION

In cases such as the two cases before this court where the conduct of multiple offenders collectively causes the victim's damages, I would follow the position advocated by the Government and adopted by the First Circuit and the Fourth Circuit to establish the proximate cause element required by § 2259. *Kearney*, 672 F.3d at 98-99; *Burgess*, 684 F.3d at 459-60. Under this "collective causation" theory, it is not necessary to measure the precise damages each of the over 100 offenders caused. As the First Circuit in *Kearney* stated: "Proximate cause exists where the tortious conduct of multiple actors has combined to bring about harm, even if the harm suffered by the plaintiff might be the same if one of the numerous tortfeasors had not committed the tort." 672 F.3d at 98. The court relied on the following statement of the rule from Prosser and Keeton:

> When the conduct of two or more actors is so related to an event that their combined conduct, viewed as a whole, is a but-for cause of the event, and application of the but-for rule to each of them individually would absolve all of them, the conduct of each is a cause in fact of the event.

KEETON ET AL., *supra*, § 41, at 268.

The court explained further:

> Proximate cause therefore exists on the aggregate level, and there is no reason to find it lacking on the individual level. The Restatement (Third) of Torts has recognized this: causation exits even where "none of the alternative causes is sufficient by itself, but together they are sufficient" to cause the harm.

Kearney, 672 F.3d at 98 (quoting RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 27 reporters' n. cmt. g. (2010); *id.* § 36 cmt. a ("[E]ven an insufficient condition . . . can be a factual cause of harm when it combines with other acts to constitute a sufficient set to cause the harm.")).

I agree with the Government and the First and Fourth Circuits that this

definition of proximate cause is appropriate in this context and under this standard the causation requirement in both cases before us is satisfied.

III.

AMOUNT OF THE AWARD

The most difficult issue in these cases–where multiple violators combine to cause horrendous damage to a young victim–is establishing some standards to guide the district court in setting an appropriate restitution award for the single offender before the court.

I agree that Amy is a victim in both cases before us. Defendant Paroline (in *In re Amy*) and defendant Wright possessed Amy's pornographic images and the statute requires the court to enter an award against them.

I agree that Amy is entitled to a restitution award from all of her offenders in a sum that is equal to the amount of her total losses. But in cases such as these where multiple violators have contributed to the victim's losses and only one of those violators is before the court, I disagree that the court must always enter an award against that single violator for the full amount of the victim's losses. I agree that § 3664(h) gives the court the option in the appropriate case of entering an award against a single defendant for the full amount of the victim's losses even though other offenders contributed to these losses. I also agree that in that circumstance the defendant can seek contribution from other offenders jointly liable for the losses.[4] We have allowed such contribution claims

[4] The Government argued that contribution would not apply in this context because the statute did not authorize it and, in any event, it would not apply among defendants convicted in different courts; but their authority on this point is very thin and does not directly and strongly support this view.

in analogous non-sex offender cases. *E.g.*, *United States v. Arledge*, 553 F.3d 881, 899 (5th Cir. 2008) (finding that defendant could "seek contribution from his co-conspirators to pay off the restitution award and reduce the amount he personally owe[d]" in the context of a fraud scheme with multiple participants); *accord United States v. Martinez*, 610 F.3d 1216, 1234 (10th Cir. 2010); *United States v. Newsome*, 322 F.3d 328, 340-41 (4th Cir. 2003).

In concluding that an award for the full amount of the victim's losses is required the majority relies on § 3664(h) which provides:

> If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or *may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant.*

(emphasis added). The majority simply ignores the second clause in § 3664(h) emphasized above. That subsection plainly gives the court the option of either (1) assessing a restitution award against the single defendant in an amount that is equal to the victim's total losses or (2) apportioning liability among the defendants to reflect each defendant's level of contribution to the victim's loss taking into consideration a number of factors including the economic circumstances of each defendant. *Accord McGarity*, 669 F.3d at 1270. It would be surprising if Congress had not given courts this option. After all, restitution is part of the defendant's criminal sentence and § 3664(h), consistent with sentencing principles generally, gives the sentencing judge discretion to fix the sentence based on the facts and circumstances surrounding the defendant's circumstances, background, and nature of his conduct. *See, e.g.*, *Burgess*, 684 F.3d at 460; *Kearney*, 672 F.3d at 100-01; *McGarity*, 669 F.3d at 1270; *Laney*,

189 F.3d at 967. One size does not fit all in this context any more than the length of a prison sentence or any other feature of a criminal sentence.

I agree with the majority that the defendants in both cases before us having been convicted of violating 18 U.S.C. § 2252 must be ordered to pay restitution to Amy. We should leave the calculation of the appropriate award against each defendant to the district court in the first instance. I would give the district court the following general guidelines:

The court must recognize that Amy's losses are an aggregation of the acts of the person who abused and filmed her assault, those who distributed and redistributed her images, and those who possessed those images. The culpability and liability for restitution of any one defendant regarding Amy's loss is dependent at least in part on the role that defendant played with respect to her exploitation. *See, e.g.*, *Burgess*, 684 F.3d at 460.

The court should first compute the victim's probable future losses based on evidence of the damages she will likely incur from the date of the defendant's offense conduct into the foreseeable future. The court should consider all items of damage listed in § 2259(b)(3) as well as any other losses suffered by the defendant related to the conduct of the violators of this chapter.

In a case such as this where multiple individuals have been convicted of contributing to her abuse, the district court has the discretion under § 3664(h) either to enter an award for the total amount of her provable losses or some portion of those losses to reflect the defendant's role in causing the damage as well as the other surrounding circumstances.

The district court is not required to justify any award with absolute precision, but the amount of the award must have a factual predicate. In determining whether it should cast the single defendant before it for the total amount of the victim's losses or in fixing the amount of a smaller award the

court should consider all relevant facts including without limitation the following:

1. The egregiousness of the defendant's conduct including whether he was involved in the physical abuse of this victim or other victims, and whether he attempted to make personal contact with victims whose images he viewed or possessed.
2. For defendants who possessed images of the victim, consider the number of images he possessed and viewed, and whether the defendant circulated or re-circulated those images to others.
3. The financial means of the defendant and his ability to satisfy an award.
4. The court may consider using the $150,000 liquidated civil damage award authorized by 18 U.S.C. § 2255 or a percentage thereof as a guide in fixing the amount of the award.
5. The court may also consider as a guide awards made in similar cases in this circuit and other circuits.
6. Any other facts relevant to the defendant's level of contribution to the victim's loss and economic circumstances of the defendant.

IV.

CONCLUSION

In summary, I would grant mandamus and vacate the judgment in *In re Amy* and remand that case to the district court to enter an award consistent with the principles outlined above. I would also vacate the judgment in *Wright* and remand for entry of judgment consistent with the above guidelines.

LESLIE H. SOUTHWICK, Circuit Judge, dissenting:

We are confronted with a statute that does not provide clear answers. I join others in suggesting it would be useful for Congress "to reconsider whether § 2259 is the best system for compensating the victims of child pornography offenses." *United States v. Kennedy*, 643 F.3d 1251, 1266 (9th Cir. 2011); *see also United States v. Burgess*, 684 F.3d 445, 460 (4th Cir. 2012). The goal is clear: providing meaningful restitution to victims of these crimes. How to order restitution in individual cases in light of that goal is a difficult question.

Our task today is to effectuate the scheme according to the congressional design as best as we can discern it. Both of the other opinions have ably undertaken this difficult task. I agree with Judge Davis that this circuit should not chart a solitary course that rejects a causation requirement. The reasons why I believe the statute requires causation are different than he expresses, though. I agree with the majority, relying on the last-antecedent rule, that the phrase "as a proximate result of the offense" that is in Section 2259(b)(3)(F) only modifies the category of loss described in (F). *See, e.g.*, *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 343 (2005).

Though I agree with the majority in that respect, I find persuasive the reasoning of the Second, Fourth, and D.C. Circuits that causation "is a deeply rooted principle in both tort and criminal law that Congress did not abrogate when it drafted § 2259." *United States v. Aumais*, 656 F.3d 147, 153 (2d Cir. 2011); *Burgess*, 684 F.3d at 457; *United States v. Monzel*, 641 F.3d 528, 535-36 (D.C. Cir. 2011). In a similar vein, the Supreme Court stated that absent "some indication of congressional intent, express or implied," courts will decline to read federal statutory crimes that fail to mention it, as eliminating the *mens rea*

requirement that has been a hallmark of crimes since the common law. *Staples v. United States*, 511 U.S. 600, 605-06 (1994).

True, the positioning of the phrase "proximate result" solely within subsection (F) could be a sign that Congress meant to eliminate causation for damages falling under subsections (A)-(E). Any such implication is thoroughly defeated, though, by other provisions of the statute. First, as the D.C. Circuit has recognized, Section 2259 calls for restitution to go to a "victim" of these crimes, a term defined as "the individual harmed *as a result* of a commission of a crime under this chapter." *Monzel*, 641 F.3d at 535 (emphasis added). Second, the statute directs that an order of restitution should be issued and enforced "in the same manner as an order under section 3663A." §2259(b)(2). Under Section 3663A "'victim' means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered." § 3663A(2). The "as a result" language from Section 2259 as well as the more explicit mention of proximate harm in Section 3663A convince me that "nothing in the text or structure of the restitution statute affirmatively indicates that Congress intended to negate the ordinary requirement of proximate causation for an award of compensatory damages." *Burgess*, 684 F.3d at 457; *Monzel*, 641 F.3d at 536.

I understand the contours of this proximate-cause requirement in much the same manner as does Judge Davis, including his analysis of "collective causation." *See also United States v. Kearney*, 672 F.3d 81, 96-98 (1st Cir. 2012). I also agree that the option of "apportion[ing] liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant" belies the majority's notion that each case calls for an award equal to the total loss incurred by a victim. § 3664(h). Yet by making restitution

"mandatory" for all these crimes of exploitation, including possession and distribution of child pornography, Congress made its "goal of ensuring that victims receive full compensation" plain. *Kearney*, 672 F.3d at 99.

Awards must therefore reflect the need to make whole the victims of these offenses. As Amy's suffering illustrates, the "distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children." *New York v. Ferber*, 458 U.S. 747, 759 (1982). They constitute an indelible "record of the children's participation and the harm to the child is exacerbated by their circulation." *Id.*

In light of the unique nature of prosecutions for child pornography and the clear congressional intent to maximize awards, any doubts about the proper amount of restitution should be resolved in favor of the child. This concern is largely a matter of a difference of emphasis from the views expressed by Judge Davis. I am concerned that his emphasis on the discretion of a district court, though clearly that discretion exists and can be exercised under the terms of Section 3664, tends towards accepting inappropriately low, even nominal awards. I would not accept that a forward-looking estimate of the number of future defendants and awards should be used to estimate a percentage of overall liability to be assigned a particular defendant. That puts too much weight on the interests of the defendants. Over-compensation is an unlikely eventuality. Were it to occur, then at that point district courts might be able to shift to evening up contributions among past and future defendants.

In summary, proximate cause must be shown and the principle of aggregate causation is the method for proving its existence. By statute, district courts can award all damages to each defendant but also have discretion to make

lesser awards if properly explained. This means that I agree with requiring additional proceedings as to both defendants, but disagree that each district court is *required* to impose a restitution award of the full amount of damages.

Appendix B
En Banc Opinion

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697 F.3d 306 (5th Cir. 2012)

In re Amy UNKNOWN, Petitioner.

United States of America, Plaintiff-Appellee,

Doyle Randall Paroline, Defendant-Appellee,

v.

Amy Unknown, Movant-Appellant.

United States of America, Plaintiff-Appellee,

v.

Michael Wright, Defendant-Appellant.

Nos. 09-41238, 09-41254, 09-31215.

United States Court of Appeals, Fifth Circuit.

October 1, 2012

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U.S. Dept. of Justice, Crim. Div., Washington, DC, William D. Baldwin, Traci Lynne Kenner, Asst. U.S. Attys., Tyler, TX, Brian Marshall Klebba, Diane Hollenshead Copes, James R. Mann, Asst. U.S. Attys., New Orleans, LA, for Plaintiff-Appellee.

Robin Elise Schulberg (argued), Covington, LA, Rorna Ajubita Kent, Asst. Fed. Pub. Def., Virginia Laughlin Schlueter, Fed. Pub. Def., Fed. Pub. Defender's Office, New Orleans, LA, for Defendant-Appellant.

Appeals from the United States District Courts for the Eastern District of Texas and the Eastern District of Louisiana.

Before STEWART, Chief Judge, and KING, JOLLY, DAVIS, JONES, SMITH, GARZA, DENNIS, CLEMENT, PRADO, OWEN, ELROD, SOUTHWICK, HAYNES and GRAVES, Circuit Judges.[1]

EMILIO M. GARZA, Circuit Judge, joined by CARL E. STEWART, Chief Judge, and E. GRADY JOLLY, EDITH H. JONES, EDITH BROWN CLEMENT, PRADO, OWEN, JENNIFER WALKER ELROD and HAYNES, Circuit Judges:

OPINION

EMILIO M. GARZA, Circuit Judge

The issue presented to the en banc court is whether 18 U.S.C. § 2259 requires a district court to find that a defendant's criminal acts proximately caused a crime victim's losses before the district court may order restitution, even though that statute only contains a " proximate result" requirement in § 2259(b)(3)(F). All our sister circuits that have addressed this question have expanded the meaning of § 2259(b)(3)(F) to apply to all losses under § 2259(b)(3), thereby restricting the district court's award of restitution to a victim's losses that were proximately caused by a defendant's criminal acts. A panel of this court rejected that reading, and instead focused on § 2259's plain language to hold that § 2259 does not limit a victim's total recoverable losses to those proximately resulting from a defendant's conduct. A subsequent panel applied that holding to another appeal, yet simultaneously questioned it in a special concurrence that mirrored the reasoning of our sister circuits. To address the discrepancy between the holdings of this and other circuits, and to respond to the concerns of our court's special concurrence, we granted rehearing en banc and vacated the panel opinions.

This en banc court holds that § 2259 only imposes a proximate result requirement in § 2259(b)(3)(F); it does not require the Government to show proximate cause to trigger a defendant's restitution obligations for the categories of losses in § 2259(b)(3)(A)-(E). Instead, with respect to those categories, the plain language of the statute dictates that a district court must award restitution for the full amount of those losses. We VACATE the district courts' judgments in both of the cases below and REMAND for further proceedings consistent with this opinion.

I

We review a set of appeals arising from two separate criminal judgments issued by different district courts within this circuit. Both appeals involve restitution requests by Amy, a young adult whose uncle sexually abused her as a child, captured his acts on film, and then distributed them for others to see. The National Center for Missing and Exploited Children, which reports that it has found at least 35,000

images of Amy's abuse among the evidence in over 3,200 child pornography cases since 1998, describes the content of these images as " extremely graphic." The Government reports that restitution has been ordered for Amy in at least 174 child pornography cases across the United States in amounts ranging from $100 to $3,543,471.

A

In the consolidated cases *In re Amy*, 591 F.3d 792 (5th Cir.2009), and *In re Amy Unknown*, 636 F.3d 190 (5th Cir.2011), a panel of this court reviewed Amy's mandamus petition and appeal, both of which challenged the district court's order denying Amy restitution in connection with a criminal defendant's sentence.

In the case underlying Amy's mandamus petition and appeal, Doyle Paroline (" Paroline") pled guilty to 18 U.S.C. § 2252 for possessing 150 to 300 images of minors engaged in sexually explicit conduct. At least two images were of Amy. Pursuant to Amy's right to restitution under the Crime Victims' Rights Act, 18 U.S.C. § 3771, the Government and Amy moved the district court to order restitution under § 2259. Amy supported this request with her psychiatrist's report, which itemized her future damages for specific categories of treatment and estimated total damages nearing $3.4 million. [2]

The district court denied Amy restitution. *United States v. Paroline*, 672 F.Supp.2d 781, 782 (E.D.Tex.2009). The district court held that § 2259 required the Government to prove that by possessing images depicting Amy's sexual abuse, Paroline proximately caused the injuries for which she sought restitution. *Id.* at 791. Concluding that the Government failed to show this causal link, the district court denied Amy restitution. *Id.* at 793. Amy petitioned for mandamus, asking this court to direct the district court to order Paroline to pay her the full amount of the restitution she had requested.

Over one dissent, that panel denied her relief because it was not clear or indisputable that § 2259 mandates restitution irrespective of proximate cause. *In re Amy*, 591 F.3d at 794-95. Amy sought rehearing and filed a separate notice of appeal from the district court's restitution order; her mandamus petition and appeal were consolidated. *See In re Amy Unknown*, 636 F.3d at 192-93. The panel assigned to hear Amy's appeal granted her rehearing request. *Id.* at 193. That panel then granted mandamus and rejected a requirement of proof of proximate cause in § 2259 because " [i]ncorporating a proximate causation requirement where none exists is a clear and indisputable error," but declined to reach the question of whether crime victims such as Amy have a right to an appeal. *Id.* at 193, 201. The panel remanded for the district court's entry of a restitution order. *Id.* at 201.

B

In *United States v. Wright*, 639 F.3d 679 (5th Cir.2011), a separate panel of this court heard the appeal of Michael Wright (" Wright"). Like Paroline, Wright pled guilty to 18 U.S.C. § 2252 for possession of over 30,000 images of child pornography, which included images of Amy's abuse. [3]

The Government sought restitution for Amy under § 2259, supporting its request with the same psychiatric report Amy provided in Paroline's case. The district court awarded Amy $529,661 in restitution, explaining that " [t]his amount was reached by adding the estimated costs of the victim's future treatment and counseling at $512,681.00 and the costs of the victim's expert witness fees at $16,980.00." Judgment at 6-7, *United States v. Wright*, No. 09-CR-103 (E.D.La. Dec. 16, 2009). The district court did not explain why it awarded no restitution for the other amounts that Amy had requested and made no reference to a proximate cause requirement. *See id.* Observing that Amy had been awarded restitution in another district court, the district court further explained that " [t]he restitution ordered herein is concurrent with any other restitution order either already imposed or to be imposed in the future payable to this victim." USCA5 R. 111-12. Wright appealed to contest the restitution order.

The *Wright* panel first found that the appeal waiver in Wright's plea agreement did not foreclose his right to appeal the restitution order. *Wright*, 639 F.3d at 683. Then, applying *Amy* 's holding, the Wright panel concluded that Amy was entitled to restitution but that the district court had given inadequate reasons for the award it assessed. *Id.* at 685-86. The panel remanded for further findings regarding the amount of the award. *Id.* at 686. The three members on the *Wright* panel, however, joined a special concurrence that questioned *Amy* 's holding and suggested that the court rehear both cases en banc, in part because this court was the first circuit to hold that a proximate cause requirement does not attach to the " full amount of ... losses" under § 2259(b)(3). *See id.* at 689-90, 692 (Davis, J., specially concurring).

This court held the mandates in both *Amy* and *Wright*. A majority of this court's members voted to rehear these opinions en banc to resolve the question of how to award restitution under § 2259 and to address other related questions raised by these appeals. *See In re Amy Unknown & United States v. Wright*, 668 F.3d 776 (5th Cir.2012) (granting rehearing en banc).

II

In rehearing *Amy* and *Wright* en banc, we address the following issues: (1)

whether the Crime Victims' Rights Act (" CVRA") grants crime victims a right to an appeal or, if not, whether this court should review Amy's mandamus petition under the standard this court has applied to supervisory writs; (2) whether 18 U.S.C. § 2259 requires the Government to show a defendant's criminal acts proximately caused a victim's injuries before a district court may award restitution; and (3) whether, in light of our holding with respect to § 2259, the district courts in *Amy* and *Wright* erred.

A

Amy petitioned for mandamus and, after this court initially denied her relief, appealed from the district court's restitution order. In the panel opinion in *Amy*, this court granted her mandamus on rehearing under our traditional mandamus inquiry, which this court held in *In re Dean*, 527 F.3d 391, 394 (5th Cir.2008) (per curiam), applies to appeals under the CVRA. *See Amy*, 636 F.3d at 197-98. In *Amy*, the panel declined to decide whether the CVRA entitled her to bring a direct appeal, *see id.* at 194-97, even though *Dean* seemingly foreclosed that argument. *See Dean*, 527 F.3d at 394 (rejecting victims' assertion that the standards governing an appeal apply on CVRA review). Amy asks the en banc court to construe the CVRA to guarantee crime victims the right of appeal and alternatively asks the court to hear her mandamus petition under our supervisory mandamus power, which would hold her mandamus petition to a less onerous standard of review than *Dean* requires.

1

The CVRA grants crime victims, including Amy, " [t]he right to full and timely restitution as provided in law," 18 U.S.C. § 3771(a)(6), and makes explicit that crime victims, their representatives, and the Government may move the district court to enforce that right. *Id.* § 3771(d)(1); *see id.* § 3771(e) (defining " crime victim" as " a person directly and proximately harmed as a result of the commission of a Federal offense."). The CVRA further commands that " [i]n any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded [this right]." *Id.* § 3771(b)(1). Where a district court denies a victim relief, the CVRA provides that

> [T]he movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed.

Id. § 3771(d)(3); *see id.* § 3771(d)(5)(B) (requiring the victim to petition for mandamus within fourteen days). The CVRA further grants the Government, " [i]n any appeal in a criminal [illegible] the authority to " assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates," *id.* § 3771(d)(4), and makes clear that " [n]othing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." *Id.* § 3771(d)(6).

Amy's argument effectively requires us to address two questions: first, whether the CVRA entitles crime victims to an appeal; and second, whether the CVRA entitles crime victims' mandamus petitions through the review standards governing an appeal. First, we observe that the plain text of the CVRA expressly grants crime victims only a right to mandamus relief and makes no mention of any right of crime victims to an appeal. *See*

18 U.S.C. § 3771(d)(3); *Dean*, 527 F.3d at 394. In contrast, the CVRA grants the Government the right to mandamus while also retaining the Government's right to a direct appeal. *Id.* § 3771(d)(4) (allowing only the Government to " assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates."). In interpreting the statute, absent contrary indication, we presume that Congress " legislated against the background of our traditional legal concepts," *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978), including that crime victims have no right to appeal. *See Marino v. Ortiz*, 484 U.S. 301, 304, 108 S.Ct. 586, 98 L.Ed.2d 629 (1988) (citing *United States ex rel. Louisiana v. Jack*, 244 U.S. 397, 402, 37 S.Ct. 605, 61 L.Ed. 1222 (1917)) (explaining that " [t]he rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment.").

Amy fails to show any language in the statute that reflects Congress' intent to depart from this principle. Instead, she protests that before the CVRA's enactment, this court heard appeals from nonparties with a direct interest in aspects of criminal prosecutions and contends that this suggests that the crime victims retain a similar right to appeal under the CVRA. *See Amy*, 636 F.3d at 195-96 (discussing *United States v. Briggs*, 514 F.2d 794 (5th Cir.1975); *United States v. Chagra*, 701 F.2d 354 (5th Cir.1983)). The cases Amy cites, however, are unconvincing. They allowed non-parties to appeal discrete pre-trial issues with constitutional implications, which were unrelated to the merits of the criminal cases from which they arose. *See Briggs*, 514 F.2d at 799 (holding that persons named as unindicted co-conspirators in an indictment had standing to challenge the power of a grand jury to charge them with criminal conduct without indicting them); *Chagra*, 701 F.2d at 360 (allowing newspapers and a reporter to appeal an order restricting their access to a pretrial bail reduction hearing). These cases do not stand for the proposition that this court has allowed victims any post-judgment right of appeal and, moreover, do not support the inference that

Congress drafted the CVRA with t[illegible]derstanding that crime victims had any right to an appeal. Because nothing in the CVRA suggests that Congress intended to grant crime victims the right to an appeal or otherwise vary the historical rule that crime victims do not have the right of appeal, we conclude that the CVRA grants crime victims only mandamus review.[4]

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Next, we consider whether the CVRA nonetheless requires appellate courts to apply the standard of review governing a direct criminal appeal to mandamus petitions, and conclude it does not. When assessing the meaning of the term " mandamus" in the CVRA, we presume that this " statutory term ... ha[s] its common-law meaning," absent contrary indication. *Taylor v. United States*, 495 U.S. 575, 592, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990). The Supreme Court has explained that " [t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Kerr v. U.S. Dist. Court*, 426 U.S. 394, 402, 96 S.Ct. 2119, 48 L.Ed.2d 725 (1976); *accord Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380, 124 S.Ct. 2576, 159 L.Ed.2d 459 (2004). " [T]he writ has traditionally been used in the federal courts only ... to compel it to exercise its authority when it is its duty to do so." *Kerr*, 426 U.S. at 402, 96 S.Ct. 2119 (quotation marks omitted). " [O]nly exceptional circumstances amounting to a judicial usurpation of power will justify the invocation of this extraordinary remedy." *Id.* (quotation marks omitted). Mandamus traditionally " is not to be used as a substitute for an appeal, or to control the decision of the trial court in discretionary matters." *Plekowski v. Ralston-Purina Co.*, 557 F.2d 1218, 1220 (5th Cir.1977). Issuance of the writ is largely a matter of discretion with the court to which the petition is addressed. *See Schlagenhauf v. Holder*, 379 U.S. 104, 112 n. 8, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964).

Certain aspects of the CVRA convince us that Congress intended mandamus in its traditional sense when it selected the word " mandamus." *See Taylor*, 495 U.S. at 592, 110 S.Ct. 2143 . Reading the statute's provisions together, the CVRA seems to intentionally limit victims' right to review as an extraordinary remedy because it authorizes review only where a district court fails to fulfill a statutory duty; the statute does not extend victims' right to review to situations where a district court acts on a discretionary matter. *See Kerr*, 426 U.S. at 402, 96 S.Ct. 2119. To explain, the CVRA lists eight rights that it ensures crime victims, including the right to restitution. 18 U.S.C. § 3771(a)(1)-(8). The restrictive statement, " A crime victim has the following rights," precedes the list of those rights and supports the conclusion that the CVRA's grant of rights is exclusive. *Id.* § 3771(a). And only where the district court denies a motion seeking to assert one of those rights does the CVRA allow a victim to seek the review of an appellate court. *See id.* § 3771(d)(3). This limitation suggests that in granting relief, the district court retains discretion to select the appropriate r[illegible] to ensure victims' rights, and that victims may only properly seek appellate intervention where the district court clearly fails to " exercise its authority when it is its duty to do so." *See Kerr*, 426 U.S. at 402, 96 S.Ct. 2119; *see also Plekowski*, 557 F.2d at 1220 (" The remedy of mandamus ... is not to be used ... to control the decision of the trial court in discretionary matters."). Under

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this reading, only the Government would retain a right to appeal even seemingly discretionary actions, *see* 18 U.S.C. § 3771(d)(4), and could elect to appeal the district court's order to the extent it exercises its own prosecutorial discretion to do so. *See id.* § 3771(d)(6). If we were to instead read the CVRA as extending a right of appeal to victims, we would expand the rights granted to crime victims and simultaneously erode the CVRA's attempt to preserve the Government's discretion. *See id.* A reading of the statute that limits victims' appellate review to the traditional mandamus inquiry thus respects both the CVRA's preservation of the Government's and the district court's traditional discretion while safeguarding the limited rights the CVRA grants.

The very short timeline in which appellate courts must act, and the fact that a single circuit judge may rule on a petition, confirm the conclusion that Congress intended to limit crime victims' appellate relief under the CVRA to traditional mandamus review. *See* 18 U.S.C. § 3771(d)(3). These requirements reflect that appellate courts must grant relief quickly, but rarely, as " a drastic remedy generally reserved for really ' extraordinary' cases." *In re E.E.O.C.*, 709 F.2d 392, 394 (5th Cir.1983) (citing *Kerr*, 426 U.S. at 402, 96 S.Ct. 2119).

Amy has failed to show that Congress intended to grant crime victims anything other than traditional mandamus relief under the CVRA.[5] While, as Amy insists, it

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may be more difficult for a crime victim to enforce rights through mandamus than appeal, this limitation reflects the express language of the statute and honors the common law tradition in place when the CVRA was drafted.

2

Our conclusion that the CVRA does not provide crime victims with appellate review does not foreclose Amy's somewhat different request that we apply our supervisory mandamus power of review to her mandamus petition, which would lower the hurdles to relief under mandamus. *See In re McBryde*, 117 F.3d 208, 223 (5th Cir.1997) (acknowledging that " courts of appeals have possessed the power to issue supervisory writs of mandamus in order to prevent practices posing

severe threats to the proper functi[illegible]g of the judicial process"); *In re E.E.O.C.*, 709 F.2d at 395 (in allowing a supervisory writ to proceed as a one-time-only device, this court advised it would only grant the writ if " there is ' usurpation of judicial power' or a clear abuse of discretion" and the movant showed it had a clear and indisputable right to a writ) (quoting *Schlagenhauf*, 379 U.S. at 110, 85 S.Ct. 234). Even so, we need not resolve this question. Our traditional inquiry suffices to afford Amy the relief she requests. *See* IV-A *infra*. *Cf. Aguirre-Gonzalez*, 597 F.3d at 53-56 (declining to settle question of standard of review because neither the traditional mandamus standard nor a more relaxed standard would afford relief in the circumstances of that case).

Because we hold that the CVRA entitles Amy to only mandamus relief, we dismiss her appeal. Under our traditional mandamus inquiry, we will grant Amy's requested mandamus only if (1) she has no other adequate means to attain the desired relief; (2) she has demonstrated a clear and indisputable right to the issuance of a writ; and (3) in the exercise of our discretion, we are satisfied that the writ is appropriate. *See Dean*, 527 F.3d at 394.

B

Wright appeals from the district court's restitution order. This court reviews the legality of the restitution order de novo. *United States v. Arledge*, 553 F.3d 881, 897 (5th Cir.2008). If the restitution order is legally permitted, we then review the amount of the order for an abuse of discretion. *Id.*; *United States v. Ollison*, 555 F.3d 152, 164 (5th Cir.2009).

III

To resolve Amy's mandamus petition and Wright's appeal, we must first ascertain the level of proof required to award restitution to Amy and crime victims like her under 18 U.S.C. § 2259. The parties' dispute turns on the interpretation and effect of the words " proximate result" in § 2259(b)(3)(F).

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A.

Our analysis again begins with the text of the statute. *See Watt*, 451 U.S. at 265, 101 S.Ct. 1673; *In re Rogers*, 513 F.3d 212, 225 (5th Cir.2008). If § 2259's language is plain, our " sole function" is to " enforce it according to its terms" so long as " the disposition required by the text is not absurd." *Lamie v. U.S. Trustee*, 540 U.S. 526, 534, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004) (internal quotation marks omitted); *see also Bates v. United States*, 522 U.S. 23, 29, 118 S.Ct. 285, 139 L.Ed.2d 215 (1997) (holding that courts " ordinarily" should " resist reading words or elements into a statute that do not appear on its face."). The Supreme Court has explained that " [s]tat[illegible]; construction ' is a holistic endeavor.' " *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455, 113 S.Ct. 2173, 124 L.Ed.2d 402 (1993) (quoting *United Savings Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988)). " This Court naturally does not review congressional enactments as a panel of grammarians; but neither do we regard ordinary principles of English prose as irrelevant to a construction of those enactments." *Flora v. United States*, 362 U.S. 145, 150, 80 S.Ct. 630, 4 L.Ed.2d 623 (1960). Although " the meaning of a statute will typically heed the commands of its punctuation[,] ... a purported plain-meaning analysis based only on punctuation is necessarily incomplete." *Bank of Or.*, 508 U.S. at 454, 113 S.Ct. 2173. " [A]t a minimum," our analysis " must account for a statute's full text, language as well as punctuation, structure, and subject matter." *Id.* at 455, 113 S.Ct. 2173.

Only after we apply principles of statutory construction, including the canons of construction, and conclude that the statute is ambiguous, may we consult legislative history. *Carrieri v. Jobs.com, Inc.*, 393 F.3d 508, 518-19 (5th Cir.2004). For statutory language to be ambiguous, however, it must be susceptible to more than one reasonable interpretation or more than one accepted meaning. *Id.* at 519. Where " the words of a statute are unambiguous, then, this first canon is also the last: ' judicial inquiry is complete.' " *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992) (quoting *Rubin v. United States*, 449 U.S. 424, 430, 101 S.Ct. 698, 66 L.Ed.2d 633 (1981)).

The language of 18 U.S.C. § 2259 reflects a broad restitutionary purpose. *See United States v. Laney*, 189 F.3d 954, 966 (9th Cir.1999) (" Section 2259 is phrased in generous terms, in order to compensate the victims of sexual abuse for the care required to address the long term effects of their abuse."); *United States v. Crandon*, 173 F.3d 122, 126 (3d Cir.1999) (" Congress [in § 2259] mandated broad restitution for a minor victim."). Section 2259(a) mandates that district courts " shall order restitution for any offense under this chapter," including the offense to which Paroline and Wright pled guilty, 18 U.S.C. § 2252. Section 2259(b)(1) specifies that a restitution order " shall direct the defendant to pay the victim ... the full amount of the victim's losses." [6]

Section 2259(b)(3) defines the term " the full amount of the victim's losses," contained in § 2259(b)(1), as

[A]ny costs incurred by the victim for—

(A) medical services relating to physical, psychiatric, or psychological care;

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(B) physical and occupational therapy or rehabilitation;

(C) necessary transportation, temp y housing, and child care expenses;

(D) lost income;

(E) attorneys' fees, as well as other costs incurred; and

(F) any other losses suffered by the victim as a proximate result of the offense.

Section 2259(b)(4) reinforces that " [t]he issuance of a restitution order under this section is mandatory," *id.* § 2259(b)(4)(A), and instructs that " [a] court may not decline to issue an order under this section because of— (i) the economic circumstances of the defendant; or (ii) the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source." *Id.* § 2259(b)(4)(B). To guide the district courts in awarding restitution, § 2259(b)(2) instructs courts to issue and enforce restitution orders " in accordance with section 3664 and in the same manner as an order under 3663A."

B

The district court in *Paroline* rejected Amy's argument that § 2259 requires an award of " the full amount of [her] losses." Instead, resorting to the Supreme Court's decision in *Porto Rico Railway, Light & Power Co. v. Mor*, 253 U.S. 345, 348, 40 S.Ct. 516, 64 L.Ed. 944 (1920), which explained that " [w]hen several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all," the district court extended the " proximate result" language contained in § 2259(b)(3)(F) to apply to the losses described in subsections (A) through (E). *See Paroline*, 672 F.Supp.2d at 788 (also citing *Fed. Mar. Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 734, 93 S.Ct. 1773, 36 L.Ed.2d 620 (1973)). In construing the statute, the district court expressed its concern that " a restitution order under section 2259 that is not limited to losses proximately caused by the defendant's conduct would under most facts, including these, violate the Eighth Amendment," *id.* at 789, and that an alternative " interpretation would be plainly inconsistent with how the principles of restitution and causation have historically been applied." *Id.* at 790. In reversing the district court's holding, the *Amy* panel rejected a generalized proximate cause requirement and stressed that the causation requirement in the definition of " victim," together with § 3664's mechanism for joint and several liability, surmounts any Eighth Amendment concerns. *See Amy*, 636 F.3d at 200-01.

Unlike the district court in *Paroline*, the *Wright* district court seemed to accept Amy's argument to a limited degree, as it awarded all of the restitution she requested for her future treatment and counseling, and the costs of her expert witness fees. Although the *Wright* panel accepted *Amy* 's holding as binding precedent in reviewing the district d a restitution award, *Wright* 's special concurrence, tracing the reasoning of the district court in *Amy* and challenging the panel's decision not to limit § 2259 to damages proximately caused by a defendant's criminal actions, presaged this en banc rehearing. *See Wright*, 639 F.3d at 686-89 (Davis, J., specially concurring).

In this en banc rehearing, Amy maintains that § 2259 is a mandatory statute requiring district courts to award full restitution to victims of child pornography. In her view, the plain language of the statute dictates that the proximate result language in § 2259(b)(3)(F) is limited to that category of losses and does not apply

to the categories of losses described in § 2259(b)(3)(A)-(E).

The Government contends that § 2259(b)(3) conditions all of a victim's recoverable losses on a showing that those losses proximately resulted from the offense. Drawing on *Porto Rico Railway*, the Government asserts that the statutory text reflects Congress' intent to condition all recoverable losses on a showing of proximate cause. Without citing to precedent, the Government urges us " to presume that Congress adhered to the usual balance in the law of remedies: to hold defendants fully accountable for the losses associated with their conduct but in a manner that respects the deeply-rooted principle of proximate causation." The Government further asserts that there is nothing absurd in the conclusion that Congress intended this limiting principle to apply to all categories of losses. Invoking a recent Supreme Court case analyzing civil tort liability under the Federal Employers' Liability Act in support of this proposition, the Government reasons that " the very purpose of a proximate-cause limitation is to prevent infinite liability." *See CSX Transp., Inc. v. McBride*, __ U.S. __, 131 S.Ct. 2630, 2642, 180 L.Ed.2d 637 (2011). The Government advises the court not to delve into legislative materials and also stresses that seven circuits have rejected Amy's reading of the statute.

Paroline similarly construes the " proximate result" language in the statute and relies on the construction of other restitution statutes to support his position. Both Paroline and Wright draw on legislative materials to assert that in drafting § 2259, Congress intended to incorporate a proximate cause requirement.[7]

C

1

Our plain reading of § 2259 leads us to the following conclusion: Once a district court determines that a person is a victim, that is, an " individual harmed as a result of a commission of a crime" under the chapter that relates to the sexual exploitation and abuse of

children, § 2259 requires the district court to order restitution for that victim. *See* 18 U.S.C. § 2259(a), (b)(4)(A), (c). The restitution order that follows must encompass " the full amount of the victim's losses." *Id.* § 2259(b)(1). Those losses include five categories of specific losses— medical services related to physical, psychiatric, or psychological care; physical and occupational therapy or rehabilitation; necessary transportation, temporary housing, and childcare expenses; lost income; and attorney's fees and costs— and one category of " other losses suffered by the victim as a proximate result of the offense." *Id.* § 2259(b)(3). The rule of the last antecedent, recently applied by the Supreme Court in *Barnhart v. Thomas*, 540 U.S. 20, 26, 124 S.Ct. 376, 157 L.Ed.2d 333 (2003), instructs that " a limiting clause or phrase," such as the " proximate result" phrase in § 2259(b)(3)(F), " should ordinarily be read as modifying only the noun or phrase that it immediately follows." " [T]his rule is not an absolute and can assuredly be overcome by other indicia of meaning," but " construing a statute in accord with the rule is ' quite sensible as a matter of grammar.' " *Id.* (quoting *Nobelman v. Am. Sav. Bank*, 508 U.S. 324, 330, 113 S.Ct. 2106, 124 L.Ed.2d 228 (1993)); *accord* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 144 (2012) (" This rule is the

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legal expression of a commonsense principle of grammar").

The structure and language of § 2259(b)(3) limit the phrase " suffered by the victim as a proximate result of the offense" in § 2259(b)(3)(F) to the miscellaneous " other losses" contained in that subsection. We see no " other indicia of meaning" in the statute to suggest that the rule of the last antecedent does not apply here. *See id.* Despite the clear terms of the statute, other courts and the parties before us raise arguments in favor of a generalized proximate cause requirement based on (a) canons of statutory construction, (b) traditional causation principles, and (c) possible absurd results. We address— and dismiss— each in turn.

a

First, the Government, Paroline, Wright, and Judge Davis's dissenting opinion press the importance of *Porto Rico Railway* and other caselaw relied on by the district court. As did the *Amy* panel, however, we doubt *Porto Rico Railway* 's applicability here. *Porto Rico Railway* concerned the following statute: " Said District Court shall have jurisdiction of all controversies where all of the parties on either side of the controversy are citizens or subjects of a foreign state or states, or citizens of a state, territory, or district of the United States not domiciled in Porto Rico ...." *Porto Rico Ry.*, 253 U.S. at 346, 40 S.Ct. 516. The Supreme Court read the words, " not domiciled in Porto Rico," to apply equally to " citizens or subjects of foreign state or states" and " citizens of a state, territory, or district of the United States." *Id.* at 348, 40 S.Ct. 516. The Supreme Court explained, " When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." *Id.* at 348, 40 S.Ct. 516.

Deprived of its context, *Porto Rico Railway* 's rule can be contorted to support the statutory interpretation urged by the Government and apply the " proximate result" language in § 2259(b)(3)(F) to the five categories of loss that precede it. But applying that rule here to require generalized proximate cause would disregard that the list in *Porto Rico Railway* 's statute is significantly different than the one central to this appeal. The statute analyzed in *Porto Rico Railway* featured a long sentence, unbroken by numbers, letters, or bullets, with two complex noun phrases sandwiching the conjunction " or," with the modifier " domiciled in Porto Rico" following the conjoined phrases. The structure of the sentence required the reading the Supreme Court gave it; the phrase " domiciled in Porto Rico" modified the nouns at the head of the two phrases, " citizens or subjects" and " citizens." The Supreme Court expressed its concern that a different construction would have left the reader with a fragmented phrase, which would be overly broad in application, and which, in turn, would have failed to satisfy the statute's overarching purpose to curtail federal courts' jurisdiction. *See Porto Rico Ry.*, 253 U.S. at 348, 40 S.Ct. 516.

Section 2259, in contrast, begins with an introductory phrase composed of a noun and verb (" ' full amount of the victim's losses' includes any costs incurred by the victim for— ") that feeds into a list of six items, each of which are independent objects that complete the phrase. Only the last of these items contains the limiting language " proximate result." A double-dash opens the list, and semi-colons separate each of its elements, leaving § 2259(b)(3) with a divided grammatical structure that does not resemble the statute in *Porto Rico Railway*, with its flowing

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sentence that lacks any distinct separations. Of course, we do not sit " as a panel of grammarians," *Flora*, 362 U.S. at 150, 80 S.Ct. 630, but we cannot ignore that " the meaning of a statute will typically heed the commands of its punctuation." *Bank of Or.*, 508 U.S. at 454, 113 S.Ct. 2173. The structural and grammatical differences between § 2259 and the statute in *Porto Rico Railway* forcefully counsel against applying *Porto Rico Railway* to the current statute to reach the *Paroline* district court's reading.[8]

Seatrain, the other case relied on by the district court, is similarly inapplicable. *See Seatrain*, 411 U.S. at 726, 93 S.Ct. 1773. *Seatrain* analyzed a federal antitrust

statute that included a seven-categ('st. *Id.* at 732, 93 S.Ct. 1773. All items on the list but the third referred to ongoing activity; the seventh category was a catchall category phrased as " or in any manner providing for an exclusive, preferential, or cooperative working arrangement." *Id.* at 732-33, 93 S.Ct. 1773. The Government urged the Supreme Court to construe this third category as concerning a one-time activity. *Id.* at 732, 93 S.Ct. 1773. The Court rejected that argument because a broad reading of the statute would conflict with the legal principle that antitrust laws are strictly construed. *Id.* at 733, 93 S.Ct. 1773. To aid in a narrow construction of the statute, the Court applied the rule of statutory construction that " [catchall] clauses are to be read as bringing within a statute categories similar in type to those specifically enumerated" and concluded that the last catchall phrase indicated that Congress intended all the activities to penalize only ongoing antitrust activities. *Id.* at 734, 93 S.Ct. 1773 (citing 2 J. SUTHERLAND, STATUTES & STATUTORY CONSTRUCTION § 4908 *et seq.* (3d ed.1943)). Here, we do not face a statutory scheme that requires narrow construction. *See Crandon*, 173 F.3d at 126; *Laney*, 189 F.3d at 966. *Seatrain* 's weight in interpreting § 2259 is questionable at best.

Seatrain 's rule is at odds with the rule of last antecedent on which we rely; the rule of last antecedent, moreover, provides a reading faithful to § 2259's broad restitutionary purpose. To illustrate, in *Barnhart v. Thomas*, the Supreme Court reviewed an agency's interpretation of a statute that states

An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do *his previous work* but cannot, considering his age, education, and work experience, engage in *any other kind of substantial gainful work* which exists in the national economy.

Barnhart, 540 U.S. at 23, 124 S.Ct. 376 (emphases added). Applying the rule of the last antecedent, the Supreme Court held that the words " which exists in the national economy" referred only to the noun " any other kind of substantial gainful work" and not to the noun " his previous work." *Id.* at 24-27, 124 S.Ct. 376. In support of this holding, the Supreme Court reasoned that the words " any other" in the

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second phrase did not show the " contrary intention" necessary to overcome the rule of the last antecedent to apply that phrase to the first. *Id.* at 27-28, 124 S.Ct. 376.

The Supreme Court also applied the rule of last antecedent in *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 125 S.Ct. 694, 160 L.Ed.2d 708 (2005) to a statute that included a complete sentence that led into a seven-category list. Each category on the list was punctuated with a period; only the last category on the list contained (iting clause. *Id.* at 340, 125 S.Ct. 694. Drawing on the grammatical structure of the list, the Supreme Court concluded that applying the limiting clause to the other items in the list " stretches the modifier too far." [9] *Id.* at 343, 125 S.Ct. 694.

As we have already explained, the grammatical structure of § 2259(b)(3) reflects the intent to read each category of loss separate from the one that preceded it and limit the application of the " proximate result" language in § 2259(b)(3)(F). Comparing the Supreme Court's more recent articulations of the rule of the last antecedent in *Barnhart* and *Jama* to the older rules of statutory construction expressed in *Porto Rico Railway* and *Seatrain* confirms that application of the rule of the last antecedent to limit the proximate result language to the subsection in which it is contained makes more sense here. *See id.* at 26, 124 S.Ct. 376. Applying the proximate result language of § 2259(b)(3)(F) to the categories that precede it would " stretch [ ] the modifier too far" and disregard the structure of § 2259(b)(3) as written. *Jama*, 543 U.S. at 343, 125 S.Ct. 694.

At least three circuits agree that under rules of statutory construction, we cannot read the " proximate result" language in § 2259(b)(3)(F) as applying to the categories of losses in § 2259(b)(3)(A)-(E).[10] *See United States v. Burgess*, 684 F.3d 445, 456-57 (4th Cir.2012); *United States v. Aumais*, 656 F.3d 147, 153 (2d Cir.2011); *United States v. Monzel*, 641 F.3d 528, 535 (D.C.Cir.), *cert. denied, Amy, Victim in Misty Child Pornography Series v. Monzel*, __ U.S. __, 132 S.Ct. 756, 181 L.Ed.2d 508 (2011). But we do not ignore that other circuits have used tools of statutory construction to conclude that the proximate result language in

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§ 2259(b)(3)(F) applies to the five categories of loss that preceded it.[11] *See United States v. McDaniel*, 631 F.3d 1204, 1208-09 (11th Cir.2011); *United States v. Laney*, 189 F.3d 954, 965 (9th Cir.1999). These circuits, however, reached this conclusion for reasons we do not find compelling. The Eleventh Circuit, for example, applied *Porto Rico Railway* 's rule without accounting for the Supreme Court's application of it. *See* § IV-C-1-a *supra* (exposing the fault in relying on the rule of *Porto Rico Railway*). The Ninth Circuit, moreover, read the " as a result of" language in § 2259's definition of victim together with the " proximate result" language in § 2259(b)(3)(F) to infuse all of § 2259(b)(3) with a proximate cause requirement. *See Laney*, 189 F.3d at 965. Without more in the statute to support that analysis, we cannot accept the Ninth Circuit's conclusion. To do so would contradict the statute's plain terms and be tantamount to judicial redrafting. *See United States v. Naftalin*, 441 U.S. 768, 773, 99 S.Ct. 2077, 60 L.Ed.2d 624 (1979) (" The short answer is that Congress did not write the statute that way."). The rules of statutory construction, properly applied, cannot be used to extend the proximate result language contained in §

2259(b)(3)(F) to the categories of l preceding it.[12]

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b

Next, we consider the Government's assertion that principles of tort liability limit the award of restitution under § 2259 to losses proximately caused by a defendant's criminal actions. At least three of our sister circuits have accepted this view and derived a proximate cause requirement not from " the catch-all provision of § 2259(b)(3)(F), but rather [from] traditional principles of tort and criminal law and [from] § 2259(c)'s definition of ' victim' as an individual harmed ' as a result' of the defendant's offense." *Monzel*, 641 F.3d at 535; *accord Burgess*, 684 F.3d at 457-58; *Aumais*, 656 F.3d at 153; *see Kearney*, 672 F.3d at 96-97 (" It is clear to us that Congress intended some causal link between the losses and the offense to support the mandated restitution."); *United States v. Evers*, 669 F.3d 645, 659 (6th Cir.2012) (adopting a proximate cause requirement but declining to decide between the two approaches of our sister circuits).

In *United States v. Monzel*, a case that has served as a springboard for other circuits evaluating § 2259, the D.C. Circuit explained that " [i]t is a bedrock rule of both tort and criminal law that a defendant is only liable for harms he proximately caused," and " a restitution statute [presumably] incorporates the traditional requirement of proximate cause unless there is good reason to think Congress intended the requirement not to apply." *Monzel*, 641 F.3d at 535-36 (footnote omitted) (citing WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 6.4, at 464, 471 (2d ed.2003)). The D.C. court posited that " [a]lthough § 2259 is a criminal statute, it functions much like a tort statute by directing the court to make a victim whole for losses caused by the responsible party," *see id.* at 536 n. 5, and found nothing in the text of § 2259 indicating Congress' intent to eliminate " the ordinary requirement of proximate cause." *Id.* at 536. Rather, " [b]y defining ' victim' as a person harmed ' as a result of' the defendant's offense,' " the court inferred that " the statute invokes the standard rule that a defendant is liable only for harms that he proximately caused." *Id.* The D.C. Circuit worried that without such a limitation, " liability would attach to all sorts of injuries a defendant might indirectly cause, no matter how ' remote' or tenuous the causal connection." *Id.* at 537.

The D.C. Circuit rejected the view expressed by the *In re Amy Unknown* panel, explaining that " [h]ad Congress meant to abrogate the traditional requirement for everything but the catch-all, surely it would have found a clearer way of doing so." *Id.* at 536-37. The D.C. Circuit criticized this court's decision in *Amy* because " a ' general' causation requirement without a subsidiary proximate causation requirement is hardly a requirement at all" ; " [s]o long as [victim's injury would not have occurred but for the defendant's offense, the defendant would be liable for the injury." *Id.* at 537 n. 8. The circuits that have adopted the D.C. Circuit's view have pursued a similar line of reasoning. We

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do not accept this reasoning, however, and refuse to inject the statute with a proximate cause requirement based on traditional principles of liability.

The Supreme Court has explained that we " ordinarily" should " resist reading words or elements into a statute that do not appear on its face." *Bates*, 522 U.S. at 29, 118 S.Ct. 285. But the Supreme Court has also explained that the absence of certain language in a statute does not necessarily mean that Congress intended courts to disregard traditional background principles. *See U.S. Gypsum Co.*, 438 U.S. at 437, 98 S.Ct. 2864. To illustrate, with respect to the question of intent in the criminal provisions of the Sherman Act, the Supreme Court has explained that

" [M]ere omission ... of intent [in the statute] will not be construed as eliminating that element from the crimes denounced" ; instead Congress will be presumed to have legislated against the background of our traditional legal concepts which render intent a critical factor, and " absence of contrary direction [will] be taken as satisfaction with widely accepted definitions, not as a departure from them."

Id. at 437, 98 S.Ct. 2864 (quoting *Morissette v. United States*, 342 U.S. 246, 263, 72 S.Ct. 240, 96 L.Ed. 288 (1952)). In interpreting the omission of intent in a different statute, the Supreme Court cautioned that " far more than the simple omission of the appropriate phrase from the statutory definition [of the offense] is necessary to justify dispensing with" a mens rea requirement. *Liparota v. United States*, 471 U.S. 419, 426, 105 S.Ct. 2084, 85 L.Ed.2d 434 (1985) (quoting *U.S. Gypsum*, 438 U.S. at 438, 98 S.Ct. 2864); *see id.* (" [T]he failure of Congress explicitly and unambiguously to indicate whether mens rea is required does not signal a departure from this background assumption of our criminal law.").

With these principles in mind, the D.C. Circuit's analysis, which infuses § 2259 with a generalized proximate cause requirement, *see Monzel*, 641 F.3d at 535, could comport with the Supreme Court's interpretative guidance— only if § 2259 were naked of causal limitations. *See U.S. Gypsum Co.*, 438 U.S. at 437, 98 S.Ct. 2864. But it is not. In assessing whether Congress intended a broad proximate cause limitation, we cannot ignore that § 2259 expresses causal requirements, yet isolates them to two discrete points: the definition of victim as an " individual harmed *as a result of* a commission of a crime," and the limitation of " any other losses" to those that are the " *proximate result* of the offense." *See* 18 U.S.C. § 2259(b),(c) (emphases

added). Had Congress omitted all[illegible]al language and not required award of the full amount of losses, or positioned the proximate result language so that it would apply to all categories of losses, we could consider the possibility that Congress intended to bind all categories of losses with a proximate cause requirement. Instead, Congress resisted using the phrase " proximate cause" anywhere in § 2259, including § 2259(b)(3)(F) and further required the court to order the " full amount of the victim's losses." [13] *See id.* The selective inclusion and omission of causal requirements in § 2259's subsections, together with language pointing away from ordinary causation, suggest that Congress intended to depart from,

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rather than incorporate, a tradition of generalized proximate cause.

This interpretation does not render the statute unworkable. The problem seeming to animate the cases in other circuits interpreting § 2259 to require proximate cause is how to allocate responsibility for a victim's harm to any single defendant. *See Burgess*, 684 F.3d at 459-61; *Aumais*, 656 F.3d at 153-54; *Kennedy*, 643 F.3d at 1265-66; *Monzel*, 641 F.3d at 537-40. These courts ignore, however, that deciding that a defendant " must pay restitution for the losses he caused (whether proximately or not)," does not resolve how the court " determines how those losses should be allocated in cases where more than one offender caused them" — injecting the statute with traditional proximate causation limitations takes courts no closer to determining what each defendant must pay or to supplying crime victims with the " full amount of [their] losses." *Burgess*, 684 F.3d at 462 (Gregory, J., concurring in part, dissenting in part, and concurring in judgment) (" The question of whether a defendant proximately caused some injury is entirely separate from the question of how those proximately caused losses should be allocated among several offenders."). By focusing on the question of proximate cause, our sister circuits have not made § 2259 any easier to apply and seemingly have ignored that § 2259 has armed courts with tools to award restitution because it instructs courts to refer to the standards under § 3664.[14] *See id.* § 2259(b)(2) (" An order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A.").

Section 3664 instructs that courts may enforce a restitution order " by all other available and reasonable means," *id.* § 3664(m)(1)(A)(ii), and offers a " means" to aid courts in awarding restitution in a way that would ensure that Amy receives the full amount of her losses, to the extent possible, while also ensuring that no defendant bears more responsibility than is required for full restitution: joint and several liability. Where " the court finds more than 1 defendant has contributed to the loss of a victim," § 3664(h) it[illegible]its that " the court may make each defendant liable for payment of the full amount of restitution." [15] The joint and several liability

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mechanism applies well in these circumstances, where victims like Amy are harmed by defendants acting separately who have caused her a single harm.[16] *See Burgess*, 684 F.3d at 461 (Gregory, J., concurring in part, dissenting in part, and concurring in judgment) (explaining that the joint and several liability described in § 3664 " ' has long been available ... in which two negligent actors, acting independently of one another, caused by a single indivisible harm to the plaintiff.' ") (quoting TORT LAW: RESPONSIBILITIES AND REDRESS 517 (John C.P. Goldberg et al. eds., 2008)). And although the D.C. Circuit has expressed that it is " unclear ... whether joint and several liability may be imposed upon defendants in separate cases," *Monzel*, 641 F.3d at 539, nothing in § 3664 forbids it, either expressly or through implication; the fact that it conforms well to this context supports its application.

Any fears that Amy and victims like her might be overcompensated through the use of joint and several liability, as expressed under § 3664(h), are unwarranted. *See, e.g., Burgess*, 684 F.3d at 458 (" While full compensation would be unlikely from any individual defendant, [the victim's] proposed interpretation of the restitution statute places no cap on her ultimate recovery, and would allow her to recover the amount of her losses many times over."). The use of joint and several liability does not mean that Amy may " recover more than her total loss: [rather,] once she collects the full amount of her losses from one defendant, she can no longer recover from any other." *Id.* at 462 (Gregory, J., concurring in part, dissenting in part, & concurring in judgment) (quoting TORT LAW, *supra*, at 517).

Section 3664 provides " reasonable means" to defend against any theoretical overcompensation that could result. *See* 18 U.S.C. § 3664(m)(1)(A)(ii). First, if Amy recovers the full amount of her losses from defendants, the Government and defendant may use this information to ensure that Amy does not seek further awards of restitution. *See id.* § 3664(e) (explaining

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that the court may resolve " [a]ny dispute as to the proper amount or type of restitution ... by the preponderance of the evidence."). Second, § 3664(k) suggests a means for ending defendants' existing joint and several restitution obligations once Amy receives the full amount of her losses; it allows for a district court, " on its own motion, or the motion of any party, including the victim, [to] adjust the payment schedule, or require immediate payment in full, as the interests of justice require." This broadly phrased subsection seems to enable courts to apply joint and several liability across

jurisdictions because it permits th .courts to adjust restitution orders as victims receive the full amount of their losses.[17] More concretely, if Amy one day receives the full amount of restitution representing the " full amount of [her] losses" under § 2259, district courts across the nation may amend the judgments of defendants to reflect this fact under § 3664(k) by terminating further restitution obligations.[18]

In either circumstance, district courts must be in possession of evidence to support entry of restitution or amendment of the defendants' judgments. There are several potential sources of this information. Victims, of course, are in the best position to know what restitution they have recovered and what restitution they have yet to receive. In addition to information obtained from victims, the Government may rely on information maintained by the probation office and other arms of the U.S. Department of Justice to ensure that amounts reported by a victim are accurate.[19] Defendants may dispute any amounts in these requests, and, under § 3664(e), the court may resolve " [a]ny dispute as to the proper amount or type of restitution ... by the preponderance of the evidence." [20]

c

Next, the Government asserts that not restricting the recovery of losses by proximate cause produces an absurd result— constitutional implications that could be avoided if we were to read § 2259 as requiring proximate causation with respect to all categories of losses. *See Lamie*, 540 U.S. at 534, 124 S.Ct. 1023 (instructing that courts must enforce a statute's terms so long as " the disposition required by the text is not absurd."). Specifically, the Government is concerned that without a proximate cause limitation, § 2259 could

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be challenged on the ground that it subjects a defendant to excessive punishment under the Eighth Amendment.

The Eighth Amendment prescribes that " [e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The Government posits that by giving effect to the statute's plain text, this court could cause Eighth Amendment problems similar to that expressed by a recent Supreme Court case involving criminal forfeiture: Where criminal forfeiture " would be grossly disproportional to the gravity of [an] offense," the Supreme Court held that it would violate the Excessive Fines Clause of the Eighth Amendment. *United States v. Bajakajian*, 524 U.S. 321, 324, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998).

First, we are not persuaded that restitution is a punishment subject to the same Eighth Amendment limits as criminal forfeiture. Its purpose is remedial, not punitive. *See United States v. Webber*, 536 F.3d 584, 602-03 (7th Cir.2008) ("Forfeiture and restitution are distinct remedies. Restitution is remedial in nature, and its goal is to restore the victim's loss. Forfeiture, in contrast, is punitive; it seeks to disgorge any profits that the offender realized from his illegal activity.") (citations omitted); *see also United States v. Taylor*, 582 F.3d 558, 566 (5th Cir.2009) (" Restitution operates to make the victim of the crime whole."). Even so, restricting the " proximate result" language to the catchall category in which it appears does not open the door to grossly disproportionate restitution in a way that would violate the Eighth Amendment. Section 2259 contains discrete causal limitations that precede the restitutionary right; restitution thus is limited to losses arising out of a victim's injury. *See* 18 U.S.C. § 2259(c) (imposing general causation requirement on definition of victim). Furthermore, the mechanisms under § 3664, which have already been described, further allay any concerns as to over-punishment. Fears over excessive punishment are misplaced.

Any concern that individual defendants may bear a greater restitutionary burden than others convicted of possessing the same victim's images, moreover, does not implicate the Eighth Amendment or threaten to create an absurd result. *See Arledge*, 553 F.3d at 899. Restitution is not tied to the defendant's gain; rather " so long as the government proved that the victim suffered the actual loss that the defendant has been ordered to pay, the restitution is proportional." *Id.* Even where a district court selectively imposed restitution on one co-defendant and not another, this court has treated this seeming inequality as being " of no consequence." *See id.* (citing *United States v. Ingles*, 445 F.3d 830, 839 (5th Cir.2006)) (explaining that " a district court may consider the relative degrees of responsibility of co-defendants in imposing restitution obligations and therefore, the simple fact that like punishment was not imposed on [the co-defendants] does not offend the constitution" (internal quotation marks and citations omitted)). Thus, the fact that some defendants, like Paroline and Wright, will be held jointly and severally liable for the full amount of Amy's losses, while other defendants convicted of possessing Amy's images may not be (because, for example, the Government or Amy does not seek restitution from them) does not offend the Eighth Amendment. *See id.*

The court, moreover, can ameliorate the impact of joint and several liability on an individual defendant by establishing a payment schedule that corresponds to the defendant's ability to pay. *See, e.g.*, Judgment at 7, *United States v. Wright*, No. 09-CR-103 (E.D.La. Dec. 16, 2009) (explaining

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the payment of restitution " shall begin while the defendant is incarcerated [and u]pon release, any unpaid balance shall be paid at a rate of $200.00 per month" and further explaining that " [t]he payment is subject to

increase or decrease, depending on [illegible]efendant's ability to pay."); *see also* 18 U.S.C. § 3664(f) (" The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant's dependents, shall be on the defendant.").

Ultimately, while the imposition of full restitution may appear harsh, it is not grossly disproportionate to the crime of receiving and possessing child pornography. *Cf id.* at 899-900 (rejecting Eighth Amendment challenge to the imposition of full restitution, pursuant to joint and several liability, under Mandatory Victims Restitution Act, in context of mail fraud case). In light of restitution's remedial nature, § 2259's built-in causal requirements, and the mechanisms described under § 3664, we do not see any Eighth Amendment concerns here or any other absurd results that our plain reading produces.

2

Accordingly, we hold that § 2259 requires a district court to engage in a two-step inquiry to award restitution where it determines that § 2259 applies. First, the district court must determine whether a person seeking restitution is a crime victim under § 2259— that is, " the individual harmed as a result of a commission of a crime under this chapter." 18 U.S.C. § 2259(c). The Supreme Court has acknowledged that " [t]he distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children," *New York v. Ferber*, 458 U.S. 747, 759, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982), and this court has elaborated that " children depicted in child pornography may be considered to be the victims of the crime of receiving child pornography." *United States v. Norris*, 159 F.3d 926, 929 (5th Cir.1998). This logic applies with equal force to defendants who possess child pornography: By possessing, receiving, and distributing child pornography, defendants collectively create the demand that fuels the creation of the abusive images. Thus, where a defendant is convicted of possessing, receiving, or distributing child pornography, a person is a victim under this definition if the images the defendant possesses, receives, or distributes include those of that individual.

Second, the district court must ascertain the full amount of the victim's losses as defined under § 2259(b)(3)(A)-(F), limiting only § 2259(b)(3)(F) by the proximate result language contained in that subsection, and craft an order guided by the mechanisms described in § 3664, with a particular focus on its mechanism for joint and several liability.

IV

Having resolved this important issue of statutory interpretation, we apply our holding to Amy's mandamus and Wright's appeal.

A

Under our traditional mandamus inquiry, we will grant Amy's petition for mandamus if (1) she has no other adequate means to attain the desired relief; (2) she has demonstrated a clear and indisputable right to the issuance of a writ; and (3) in the exercise of our discretion, we are satisfied that the writ is appropriate in these circumstances. *See Dean*, 527 F.3d at 394. As the Supreme Court has noted, the " hurdles" limiting use of mandamus, " however demanding, are not insuperable."

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Cheney v. U.S. Dist. Court, 542 U.S. 367, 381, 124 S.Ct. 2576, 159 L.Ed.2d 459 (2004).

We easily conclude that the first prong is met. Because we have held that the CVRA limits crime victims' relief to the mandamus remedy, Amy has no other means for obtaining review of the district court's decision not to order restitution. *See supra* § II-A. We are also satisfied that a writ is appropriate in these circumstances: The CVRA expressly authorizes mandamus, 18 U.S.C. § 3771(d)(3), and awarding restitution would satisfy § 2259's broad restitutionary purpose. Next, we conclude that Amy has a " clear and indisputable" right to restitution in light of our holding today. First, Amy is a " victim" under § 2259(c). Paroline possessed at least two of her images, and his possession of those images partly formed the basis of his conviction. *See Ferber*, 458 U.S. at 759, 102 S.Ct. 3348; *Norris*, 159 F.3d at 929. Amy, as an " individual harmed as a result of [Paroline's] commission of a crime" falling within § 2259's scope, is thus a victim under § 2259. *See Kearney*, 672 F.3d at 94 (" Any argument that [Amy] has not suffered harm as a result of [Paroline's] crimes defies both fact and law."). Because Amy is a victim, § 2259 required the district court to award her restitution for the " full amount of [her] losses" as defined under § 2259(b)(3). Because the district court awarded Amy nothing, it therefore clearly and indisputably erred. No matter what discretion the district court possessed and no matter how confounding the district court found § 2259, it was not free to leave Amy with nothing.

On remand, the district court must enter a restitution order reflecting the " full amount of [Amy's] losses" in light of our holdings today.

B

Turning to Wright's appeal, Amy is eligible for restitution as a " victim" of Wright's crime of possessing images of her abuse for the same reasons she is eligible as a victim of Paroline's crime. *See supra* § IV-A. It was therefore legal for the district court to order restitution to Amy. *See Arledge*, 553 F.3d at 897 (reviewing the legality of the restitution order de novo). Wright's appeal therefore necessarily focuses on the amount of the district court's restitution award, which we review for an abuse of discretion. *Id.* The district court awarded Amy $529,661 by adding Amy's estimated future counseling

costs to the value of her expert wit[illegible] fees. The district court did not explain why Wright should not be required to pay for any of the other losses Amy requested, and the record does not otherwise disclose why the district court reduced the Government's full request on Amy's behalf. Because the district court's order of restitution is seemingly at odds with § 2259's requirement that it award Amy the full amount of her losses, we vacate the district court's order and remand for reconsideration of restitution in light of this opinion.

V

For the reasons above, we reject the approach of our sister circuits and hold that § 2259 imposes no generalized proximate cause requirement before a child pornography victim may recover restitution from a defendant possessing images of her abuse. We VACATE the district courts' judgments below and REMAND for proceedings consistent with this opinion.[21]

DENNIS, Circuit Judge, concurring in part in the judgment:

I respectfully concur in the majority opinion's decision that the CVRA does not

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grant crime victims a right to a direct appeal from a district court's rejection of her claim for restitution under 18 U.S.C. § 2259; that the CVRA grants crime victims only a right to seek traditional mandamus review; and that the CVRA grants the government the right to seek mandamus and to retain its right to a direct appeal.

I further agree with the majority that neither the Government nor the victim is required to prove that the victim's losses defined by 18 U.S.C. § 2259(b)(3)(A)-(E) were a proximate result of the defendant's crime; it is only " any other loss suffered by the victim" that must be proved to be " a proximate result of the offense." *Id.* § 2259(b)(3)(F). Section 2259(c) defines " victim" as an " individual harmed as a result of a commission of a crime under this chapter," but it does not require a showing that the victim's losses included in § 2259(b)(3)(A)-(E) be a " proximate result of the offense." From this, I infer that the statute places only a slight burden on the victim or the government to show that the victim's losses or harms enumerated in those subsections plausibly resulted from the offense. Once that showing has been made, in my view, a presumption arises that those enumerated losses were the proximate result of the offense, which the defendant may rebut with sufficient relevant and admissible evidence.

Finally, I agree with the majority's conclusion that where a defendant is convicted of possessing child pornography, a person is a victim under the statute if the images include those of that individual. In these cases, I agree that the government and the victim have made a sufficient showing, unrebutted by the defendant, that the victim is entitled to restitution of losses falling under 18 U.S.C. § 2259(b)(3)(A)-(E). Therefore, I concur in that part of the majority's judgment that vacates the district courts' judgments and remands the cases to them for further proceedings.

In remanding, however, I would simply direct the district courts to proceed to issue and enforce the restitution orders in accordance with 18 U.S.C. § 3664 and 3663A, as required by § 2259(b)(2). Going forward, I believe it best to permit district courts to craft procedural and substantive devices for ordering restitution that would take into account both the mandatory nature of full restitution for crime victims under section 2259 and the mechanical difficulties of crafting orders given the possibility of multiplicitous liability among hundreds of defendants under circumstances that may change over time. While I admire the majority's effort to provide guidance to the district courts in their extremely difficult task of molding and merging these federal statutes, §§ 2259, 3663A, and 3664, into a legal, just, and predictable system, I believe that effort is premature in this court at this time on the present record. Rather, I would leave the decision as to how to proceed under these statutes to the district courts, which may decide to take additional evidence and require study and briefing by the parties to assist them in these difficult cases.

W. EUGENE DAVIS, Circuit Judge, concurring in part and dissenting in part, joined by KING, JERRY E. SMITH and GRAVES, Circuit Judges:

I agree with my colleagues in the majority that we should grant mandamus in *In re Amy* and remand for entry of a restitution award.[1] I also agree that we should vacate the award entered in *Wright* and remand for further consideration on the

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amount of the award. The devil is in the details, however, and I disagree with most of the majority's analysis.

I disagree with my colleagues in the majority in two major respects:

1. Although I conclude that the proximate cause proof required by the restitution statutes can be satisfied in these cases, I disagree with the majority that the statute authorizes restitution without any proof that the violation proximately caused the victim's losses.

2. I agree with the majority that the district court must enter a restitution award against every offender convicted of possession of the victim's pornographic image; but I disagree with the majority that in cases such as these two, where the offenses of multiple violators contribute to the victim's damages, the district court must enter an award against each offender for the full amount of the victim's

losses. No other circuit that has addressed this issue has adopted such a one size fits all rule for the restitution feature of the sentence of an offender. Other circuits have given the district courts discretion to assess the amount of the restitution the offender is ordered to pay. *See, e.g., United States v. Burgess*, 684 F.3d 445, 460 (4th Cir.2012); *United States v. Kearney*, 672 F.3d 81, 100-01 (1st Cir.2012); *United States v. McGarity*, 669 F.3d 1218, 1270 (11th Cir.2012); *United States v. Laney*, 189 F.3d 954, 967 (9th Cir.1999).

I.

THE STATUTES

At bottom, this is a statutory interpretation case, and I begin with a consideration of the structure and language of the statutes at issue that facially belie the majority's position that victims may be awarded restitution for losses not proximately caused by offense conduct. Section 2259 specifically governs mandatory restitution awards for crimes related to the sexual exploitation and abuse of children. A number of provisions in the statute make it clear that proof of a causal connection is required between the offenses and the victim's losses.

Section 2259(b)(2) expressly incorporates the general restitution procedures of 18 U.S.C. § 3664 and states that " [a]n order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A." Section 3664(e) states that " [t]he burden of demonstrating the *amount of the loss* sustained by a victim *as a result of the offense* shall be on the attorney for the Government." (emphasis added).

This language requiring proof of causation from § 3664(e) is consistent with the language defining " victim" found in § 2259(c), who is defined as " the individual harmed *as a result of* a commission of crime under this chapter ...." (emphasis added).

Section 2259(a) states that the court " shall order restitution for any offense under this chapter." Section 2259(b)(3) states that the victim's losses are defined as those suffered by the victim " as a proximate result of the offense." The full text of § 2259(b)(3) is as follows:

[T]he term " full amount of the victim's losses" includes any costs incurred by the victim for—

(A) medical services relating to physical, psychiatric, or psychological care;

(B) physical and occupational therapy or rehabilitation;

(C) necessary transportation, temporary housing, and child care expenses;

(D) lost income;

(E) attorneys' fees, as well as other costs incurred; and

(F) any other losses suffered by the victim *as a proximate result of the offense*

(emphasis added).

In interpreting this provision we should follow the fundamental canon of statutory construction established by the Supreme Court in *Porto Rico Railway, Light & Power Co. v. Mor*, 253 U.S. 345, 40 S.Ct. 516, 64 L.Ed. 944 (1920). In that case, the Court held that " [w]hen several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." *Id.* at 348, 40 S.Ct. 516. Applying this cardinal rule of statutory interpretation, I conclude that subsection (F)'s " as a proximate result of the offense" language applies equally to the previous five subcategories of losses, (A) through (E). This interpretation was accepted by the Eleventh Circuit in *United States v. McDaniel*, 631 F.3d 1204, 1209 (11th Cir.2011) (" The phrase ' as a proximate result of the offense' is equally applicable to medical costs, lost income, and attorneys' fees as it is to ' any other losses.' " (citing *Porto Rico Ry.*, 253 U.S. at 348, 40 S.Ct. 516)); *see also Laney*, 189 F.3d at 965 (reading the " as a result of" language in § 2259's definition of victim together with the " proximate result" language in § 2259(b)(3)(F) to infuse all of 2259(b)(3) with a proximate cause requirement).

In contrast, the majority concludes that once the district court determines that a person is a victim (an individual harmed as a result of an offense under § 2259) the district court must order restitution without further proof of causation.[2]

The majority's reading of § 2259(b)(3) is patently inconsistent with the rule of statutory interpretation announced in *Porto Rico Railway*, which makes it clear that the clause should be read to apply to all categories of loss.[3] My conclusion that *Porto Rico Railway*'s rule of interpretation applies in this case is made even clearer when we consider the multiple references in the statutes discussed above expressly reflecting Congressional intent to require proof of causation.

The D.C. Circuit and other circuits have reached the same conclusion— that is, that § 2259 requires proof of proximate cause— albeit by a slightly different reasoning. *See United States v. Monzel*, 641 F.3d 528, 535-37 (D.C.Cir.2011); *United States v. Aumais*, 656 F.3d 147, 153 (2d Cir.2011); *Burgess*, 684 F.3d at 459. The D.C. Circuit explained that it is

a bedrock rule of both tort and criminal law that a defendant is only liable for harms he proximately caused. (" An essential element of the plaintiff's cause of action

for negligence, or ... any other tort[]" at there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered. This connection

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usually is dealt with by the courts in terms of what is called ' proximate cause' ....").

(footnote omitted) (citation omitted) (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 263 (5th ed.1984)); *see also* WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 6.4, at 464 (2d ed. 2003) (" [For] crimes so defined as to require not merely conduct but also a specified result of conduct, the defendant's conduct must be the ' legal' or ' proximate' cause of the result."). " Thus, we will presume that a restitution statute incorporates the traditional requirement of proximate cause unless there is good reason to think Congress intended the requirement not to apply." *Monzel*, 641 F.3d at 536. The court found that " nothing in the text or structure of § 2259 leads us to conclude that Congress intended to negate the ordinary requirement of proximate cause." *Id*

Other circuits have used different analyses but all circuits to confront this issue have interpreted the statute as using a proximate causation standard connecting the offense to the losses. *See United States v. Evers*, 669 F.3d 645, 658-59 (6th Cir.2012) (finding a proximate cause requirement but declining to choose whether to adopt the *McDaniel* or *Monzel* rationale as they are " complementary"); *Kearney*, 672 F.3d at 96, 99 (adopting a proximate cause standard but not specifying under what analysis); *United States v. Crandon*, 173 F.3d 122, 125-26 (3d Cir.1999) (stating, without analysis, that § 2259 requires damages for losses suffered " as a proximate result of the offense"). This circuit is the only circuit that has interpreted § 2259 and concluded that proximate cause is not required by the statute.

For the above reasons, I conclude that the statutes at issue require proof that the defendant's offense conduct proximately caused the victim's losses before a restitution award can be entered as part of the defendant's sentence.

II.

CAUSATION

In cases such as the two cases before this court where the conduct of multiple offenders collectively causes the victim's damages, I would follow the position advocated by the Government and adopted by the First Circuit and the Fourth Circuit to establish the proximate cause element required by § 2259. *Kearney*, 672 F.3d at 98-99; *Burgess*, 684 F.3d at 459-60. Under this " collective causation" theory, it is not necessary to measure the precise damages each of the over 100 offenders caused. As th[]st Circuit in *Kearney* stated: " Proximate cause exists where the tortious conduct of multiple actors has combined to bring about harm, even if the harm suffered by the plaintiff might be the same if one of the numerous tortfeasors had not committed the tort." 672 F.3d at 98. The court relied on the following statement of the rule from Prosser and Keeton:

When the conduct of two or more actors is so related to an event that their combined conduct, viewed as a whole, is a but-for cause of the event, and application of the but-for rule to each of them individually would absolve all of them, the conduct of each is a cause in fact of the event.

KEETON ET AL., *supra*, § 41, at 268.

The court explained further:

Proximate cause therefore exists on the aggregate level, and there is no reason to find it lacking on the individual level. The Restatement (Third) of Torts has recognized this: causation exits even where " none of the alternative causes is sufficient by itself, but together they are sufficient" to cause the harm.

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Kearney, 672 F.3d at 98 (quoting RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 27 reporters' n. cmt. g. (2010); *id.* § 36 cmt. a (" [E]ven an insufficient condition ... can be a factual cause of harm when it combines with other acts to constitute a sufficient set to cause the harm.")).

I agree with the Government and the First and Fourth Circuits that this definition of proximate cause is appropriate in this context and under this standard the causation requirement in both cases before us is satisfied.

III.

AMOUNT OF THE AWARD

The most difficult issue in these cases—where multiple violators combine to cause horrendous damage to a young victim—is establishing some standards to guide the district court in setting an appropriate restitution award for the single offender before the court.

I agree that Amy is a victim in both cases before us. Defendant Paroline (in *In re Amy*) and defendant Wright possessed Amy's pornographic images and the statute requires the court to enter an award against them.

I agree that Amy is entitled to a restitution award from all of her offenders in a sum that is equal to the amount of her total losses. But in cases such as these where multiple violators have contributed to the victim's losses and only one of those violators is before the court,

I disagree that the court must all enter an award against that single violator for the full amount of the victim's losses. I agree that § 3664(h) gives the court the option in the appropriate case of entering an award against a single defendant for the full amount of the victim's losses even though other offenders contributed to these losses. I also agree that in that circumstance the defendant can seek contribution from other offenders jointly liable for the losses.[4] We have allowed such contribution claims in analogous non-sex offender cases. *E.g., United States v. Arledge*, 553 F.3d 881, 899 (5th Cir.2008) (finding that defendant could " seek contribution from his co-conspirators to pay off the restitution award and reduce the amount he personally owe[d]" in the context of a fraud scheme with multiple participants); *accord United States v. Martinez*, 610 F.3d 1216, 1234 (10th Cir.2010); *United States v. Newsome*, 322 F.3d 328, 340-41 (4th Cir.2003).

In concluding that an award for the full amount of the victim's losses is required the majority relies on § 3664(h) which provides:

If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or *may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant.*

(emphasis added). The majority simply ignores the second clause in § 3664(h) emphasized above. That subsection plainly gives the court the option of either (1) assessing a restitution award against the single defendant in an amount that is equal to the victim's total losses or (2) apportioning liability among the defendants to reflect each defendant's level of contribution

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to the victim's loss taking into consideration a number of factors including the economic circumstances of each defendant. *Accord McGarity*, 669 F.3d at 1270. It would be surprising if Congress had not given courts this option. After all, restitution is part of the defendant's criminal sentence and § 3664(h), consistent with sentencing principles generally, gives the sentencing judge discretion to fix the sentence based on the facts and circumstances surrounding the defendant's circumstances, background, and nature of his conduct. *See, e.g., Burgess*, 684 F.3d at 460; *Kearney*, 672 F.3d at 100-01; *McGarity*, 669 F.3d at 1270; *Laney*, 189 F.3d at 967. One size does not fit all in this context any more than the length of a prison sentence or any other feature of a criminal sentence.

I agree with the majority that the defendants in both cases before us having been convicted of violating 18 U.S.C. § 2252 must be ordered to pay restitution to Amy. We should leave the calculation of the appropriate award against each defendant the district court in the first instance. I would give the district court the following general guidelines:

The court must recognize that Amy's losses are an aggregation of the acts of the person who abused and filmed her assault, those who distributed and redistributed her images, and those who possessed those images. The culpability and liability for restitution of any one defendant regarding Amy's loss is dependent at least in part on the role that defendant played with respect to her exploitation. *See, e.g., Burgess*, 684 F.3d at 460.

The court should first compute the victim's probable future losses based on evidence of the damages she will likely incur from the date of the defendant's offense conduct into the foreseeable future. The court should consider all items of damage listed in § 2259(b)(3) as well as any other losses suffered by the defendant related to the conduct of the violators of this chapter.

In a case such as this where multiple individuals have been convicted of contributing to her abuse, the district court has the discretion under § 3664(h) either to enter an award for the total amount of her provable losses or some portion of those losses to reflect the defendant's role in causing the damage as well as the other surrounding circumstances.

The district court is not required to justify any award with absolute precision, but the amount of the award must have a factual predicate. In determining whether it should cast the single defendant before it for the total amount of the victim's losses or in fixing the amount of a smaller award the court should consider all relevant facts including without limitation the following:

1. The egregiousness of the defendant's conduct including whether he was involved in the physical abuse of this victim or other victims, and whether he attempted to make personal contact with victims whose images he viewed or possessed.

2. For defendants who possessed images of the victim, consider the number of images he possessed and viewed, and whether the defendant circulated or re-circulated those images to others.

3. The financial means of the defendant and his ability to satisfy an award.

4. The court may consider using the $150,000 liquidated civil damage award authorized by 18 U.S.C. § 2255 or a percentage thereof as a guide in fixing the amount of the award.

5. The court may also consider as a guide awards made in similar cases in this circuit and other circuits.

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6. Any other facts relevant to defendant's level of contribution to the victim's loss and economic circumstances of the defendant.

IV.

CONCLUSION

In summary, I would grant mandamus and vacate the judgment in *In re Amy* and remand that case to the district court to enter an award consistent with the principles outlined above. I would also vacate the judgment in *Wright* and remand for entry of judgment consistent with the above guidelines.

LESLIE H. SOUTHWICK, Circuit Judge, dissenting:

We are confronted with a statute that does not provide clear answers. I join others in suggesting it would be useful for Congress " to reconsider whether § 2259 is the best system for compensating the victims of child pornography offenses." *United States v. Kennedy*, 643 F.3d 1251, 1266 (9th Cir.2011); *see also United States v. Burgess*, 684 F.3d 445, 460 (4th Cir.2012). The goal is clear: providing meaningful restitution to victims of these crimes. How to order restitution in individual cases in light of that goal is a difficult question.

Our task today is to effectuate the scheme according to the congressional design as best as we can discern it. Both of the other opinions have ably undertaken this difficult task. I agree with Judge Davis that this circuit should not chart a solitary course that rejects a causation requirement. The reasons why I believe the statute requires causation are different than he expresses, though. I agree with the majority, relying on the last-antecedent rule, that the phrase " as a proximate result of the offense" that is in Section 2259(b)(3)(F) only modifies the category of loss described in (F). *See, e.g., Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 343, 125 S.Ct. 694, 160 L.Ed.2d 708 (2005).

Though I agree with the majority in that respect, I find persuasive the reasoning of the Second, Fourth, and D.C. Circuits that causation " is a deeply rooted principle in both tort and criminal law that Congress did not abrogate when it drafted § 2259." *United States v. Aumais*, 656 F.3d 147, 153 (2d Cir.2011); *Burgess*, 684 F.3d at 457; *United States v. Monzel*, 641 F.3d 528, 535-36 (D.C.Cir.2011). In a similar vein, the Supreme Court stated that absent " some indication of congressional intent, express or implied," courts will decline to read federal statutory crimes that fail to mention it, as eliminating the *mens rea* requirement that has been a hallmark of crimes since the common law. *Staples v. United States*, 511 U.S. 600, 605-06, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994).

True, the positioning of the phrase " proximate result" solely within subsection (F) could be a sign that Congress meant to eliminate causation for damages falling under subsections (A)-(E). Any such implication is thoroughly defeated, though, by other provisions of the statute. First, as the D.C. Circuit has recognized, Section 2259 calls for restitution to go to a " victim" of these crimes, a term defined as " the individual harmed *as a result* of a commission of a crime under this chapter." *Monzel*, 641 F.3d at 535 (emphasis added). Second, the statute directs that an order of restitution should be issued and enforced " in the same manner as an order under section 3663A." § 2259(b)(2). Under Section 3663A " 'victim' means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered." § 3663A(2). The " as a result" language from

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Section 2259 as well as the more explicit mention of proximate harm in Section 3663A convince me that " nothing in the text or structure of the restitution statute affirmatively indicates that Congress intended to negate the ordinary requirement of proximate causation for an award of compensatory damages." *Burgess*, 684 F.3d at 457; *Monzel*, 641 F.3d at 536.

I understand the contours of this proximate-cause requirement in much the same manner as does Judge Davis, including his analysis of " collective causation." *See also United States v. Kearney*, 672 F.3d 81, 96-98 (1st Cir.2012). I also agree that the option of " apportion[ing] liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant" belies the majority's notion that each case calls for an award equal to the total loss incurred by a victim. § 3664(h). Yet by making restitution " mandatory" for all these crimes of exploitation, including possession and distribution of child pornography, Congress made its " goal of ensuring that victims receive full compensation" plain. *Kearney*, 672 F.3d at 99.

Awards must therefore reflect the need to make whole the victims of these offenses. As Amy's suffering illustrates, the " distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children." *New York v. Ferber*, 458 U.S. 747, 759, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). They constitute an indelible " record of the children's participation and the harm to the child is exacerbated by their circulation." *Id.*

In light of the unique nature of prosecutions for child pornography and the clear congressional intent to maximize awards, any doubts about the proper amount of restitution should be resolved in favor of the child. This concern is largely a matter of a difference of emphasis from the views expressed by Judge Davis. I am concerned that his emphasis on the discretion of a district court, though clearly that discretion exists and can be exercised under the terms of Section 3664, tends towards

accepting inappropriately low, eve[illegible]minal awards. I would not accept that a forward-looking estimate of the number of future defendants and awards should be used to estimate a percentage of overall liability to be assigned a particular defendant. That puts too much weight on the interests of the defendants. Over-compensation is an unlikely eventuality. Were it to occur, then at that point district courts might be able to shift to evening up contributions among past and future defendants.

In summary, proximate cause must be shown and the principle of aggregate causation is the method for proving its existence. By statute, district courts can award all damages to each defendant but also have discretion to make lesser awards if properly explained. This means that I agree with requiring additional proceedings as to both defendants, but disagree that each district court is *required* to impose a restitution award of the full amount of damages.

Notes:

[1] Judge Higginson is recused and did not participate in any aspect of this en banc rehearing.

[2] Amy attested that this amount reflects the total amount of her losses from the production, distribution, and possession of the images of her abuse and primarily comprises costs for future psychological care and future lost income.

[3] Wright pled guilty pursuant to a plea agreement in which he generally waived his right to appeal but reserved his right to appeal " any punishment in excess of the statutory maximum." Wright's plea agreement stated that " the restitution provisions of Sections 3663 and 3663A of Title 18, United States Code will apply" and made no reference to § 2259. During the guilty plea colloquy, the district court restated the terms of the plea agreement regarding Wright's appeal waiver. The district court asked Wright if he understood all the rights he was waiving, and he responded that he did. The district court also asked Wright if he understood that he " also may be required to reimburse any victim for the amount of his or her loss under the Victim Restitution Law, if that term is applicable." Wright again said he understood.

The Government seeks to assert the appeal waiver Wright signed only if we hold that restitution is limited by proximate cause in all respects. It concedes, however, that Wright's appeal waiver would not be valid if the en banc court holds that § 2259 lacks a proximate cause requirement that covers all categories of losses because Wright did not waive his right to appeal a sentence unbounded by a proximate cause limitation. Because we hold today that § 2259's isolated " proximate result" language does not cloak all categories of losses with a proximate cause requirement, we need not further address the appeal waiver issue. We have repeatedly held that appeal waivers the Gov[illegible]ment does not seek to enforce are not self-enforcing and that the Government can effectively " waive the waiver." *See United States v. Acquaye*, 452 F.3d 380, 381 (5th Cir.2006). Given the Government's concession and our holding on the substance of § 2259, we conclude that the Government is not seeking to enforce the appeal waiver in this case. Accordingly, we conclude that the appeal waiver does not bar Wright's appeal. *See id.*

[4] Six of our sister circuits generally favor a reading of the statute that allows no appeal, and no circuit has expressly granted victims the right to an appeal under the CVRA. *See United States v. Alcatel-Lucent France, SA*, 688 F.3d 1301, 1307 (11th Cir.2012); *United States v. Monzel*, 641 F.3d 528, 533 (D.C.Cir.), *cert. denied, Amy, Victim in Misty Child Pornography Series v. Monzel*, __ U.S. __, 132 S.Ct. 756, 181 L.Ed.2d 508 (2011); *United States v. Aguirre-Gonzalez*, 597 F.3d 46, 53-56 (1st Cir.2010); *In re Antrobus*, 519 F.3d 1123, 1128-30 (10th Cir.2008); *Kenna v. U.S. Dist. Court*, 435 F.3d 1011, 1017 (9th Cir.2006); *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555, 562-63 (2d Cir.2005); *see also In re Acker*, 596 F.3d 370, 373 (6th Cir.2010) (" [W]here the [purported victim's] direct appeal was filed at the same time as the [CVRA] mandamus petition and raises the identical issues, there is no additional right of appeal.").

Further supporting this conclusion is that under the Victim and Witness Protection Act (" VWPA"), the CVRA's predecessor in which restitution was optional rather than mandatory, at least one circuit court denied victims a right to any relief because " [n]owhere in the statute does Congress suggest that the VWPA was intended to provide victims with a private remedy to sue or appeal restitution decisions." *United States v. Mindel*, 80 F.3d 394, 397 (9th Cir.1996). This same logic extends to limit the right of crime victims under the CVRA to only the mandamus relief that the statute clearly expresses. *See id.*

The cases Amy relies on, moreover, further disfavor allowing a § 1291 appeal. Any persuasive force that *In re Siler*, 571 F.3d 604, 608 (6th Cir.2009) (allowing crime victims to appeal under § 1291 when they sought the use of a presentencing report in a subsequent civil suit), may have is undercut by the Sixth's Circuit later decision not to extend a right of appeal to a crime victim who simultaneously petitioned for mandamus relief. *See In re Acker*, 596 F.3d 370, 373 (6th Cir.2010). Likewise, the Third Circuit's decision allowing a crime victim a § 1291 appeal, without any analysis, in *United States v. Kones*, 77 F.3d 66, 68 (3d Cir.1996), also fails to convince us that allowing crime victims a § 1291 appeal is proper.

[5] Amy nevertheless insists that the CVRA's requirements that the courts of appeals " take up and decide" a petition and " ensure that the crime victim is afforded" all his or her rights in a court proceeding support recognizing victims' right to an appeal and disfavor an interpretation that would provide for

traditional mandamus review, (h is typically discretionary. *See* 18 U.S.C. § 3771(b)(1), (d)(3). The requirement that appellate courts " take up and decide" a petition, however, relates directly to the short time period in which Congress directs appellate courts to act; this short time period, as we have already explained, favors, rather than opposes, the use of mandamus. *See supra*. Similarly, Amy fails to note that the command that federal courts " ensure that the crime victim is afforded" certain rights falls within a section labeled " In general." *See id.* § 3771(b)(1). Placed in context, this language merely reflects Congress' intention to make plain that federal courts must guard the specific, but necessarily limited, rights spelled out in the CVRA through the processes prescribed in its other subsections. This language does not suggest that the grant of mandamus in this context is not discretionary. Amy's arguments are unavailing.

Only two circuits support Amy's position that she is entitled to something more closely resembling direct appellate standards of review. With little analysis, the Second Circuit has concluded an abuse of discretion standard should govern CVRA mandamus petitions. *See In re W.R. Huff*, 409 F.3d at 562-63. That court divined a relaxed standard from the express terms of the statute and reasoned only that " [i]t is clear ... that a petitioner seeking relief pursuant to the mandamus provision set forth in § 3771(d)(3) need not overcome the hurdles typically faced by a petitioner seeking review of a district court determination through a writ of mandamus." *Id.* at 562-63. The lack of reasoning accompanying the Second Circuit's use of a relaxed standard of review fails to convince us that anything other than traditional mandamus standards should govern our review of CVRA petitions.

The Ninth Circuit also has provided for relaxed review, focusing on legal error in reviewing a crime victim's mandamus petition under the CVRA. To justify this relaxed review, the Ninth Circuit emphasized that " [t]he CVRA explicitly gives victims aggrieved by a district court's order the right to petition for review by writ of mandamus, provides for expedited review of such a petition, allows a single judge to make a decision thereon, and requires a reasoned decision in case the writ is denied." *Kenna*, 435 F.3d at 1017. But a later decision suggests that the Ninth Circuit's interpretation in *Kenna* was influenced by the facts of that case and a desire to reach a question of law that its traditional mandamus inquiry would not have allowed; in that later case, the Ninth Circuit explained that it applies its normal test to CVRA mandamus petitions, and merely emphasizes the question of legal error in assessing a crime victim's right to relief. *See In re Andrich*, 668 F.3d 1050, 1051 (9th Cir.2011) (per curiam).

While Amy asserts that two additional circuits favor her position, those courts have not clearly accepted her position, and it is unclear that they would do so if presented with the opportunity to fully analyze the legal issues this question pr(. *See In re Stewart*, 552 F.3d 1285 (11th Cir.2008) (granting mandamus on question of whether a person was a crime victim who could participate in district court proceedings without reviewing traditional mandamus factors); *In re Walsh*, 229 Fed.Appx. 58, 60-61 (3d Cir.2007) (in dicta, agreeing with the Second and Ninth Circuits that " mandamus relief is available under a different, and less demanding, standard under 18 U.S.C. § 3771 in the appropriate circumstances.").

[6] A " victim" is an " individual harmed as a result of a commission of a crime under this chapter." *Id.* § 2259(c).

[7] Of course, we cannot consult these materials unless we conclude that § 2259's text is ambiguous. *See Carrieri*, 393 F.3d at 518-19. Even if we were to consult these materials, they are inconclusive at best.

[8] Further, *Porto Rico Railway* also commands that where the statute in question " manifests a general purpose ... [and] the application of the clause were doubtful, we should so construe the provision as to effectuate the general purpose of Congress." 253 U.S. at 348, 40 S.Ct. 516. The grammar of § 2259, viewed in light of § 2259's broad restitutionary purpose as expressed by its plain terms, confirms that our reading is correct. *See Crandon*, 173 F.3d at 126 (" Congress [in § 2259] mandated broad restitution for a minor victim."); *Laney*, 189 F.3d at 966 (" Section 2259 is phrased in generous terms, in order to compensate the victims of sexual abuse for the care required to address the long term effects of their abuse.").

[9] In *Barnhart*, Justice Scalia provided an example of application of this rule in ordinary life that reveals the commonsensical aspect of the error in applying the proximate result language of § 2259(b)(3)(F) to the five categories of losses that precede it:

Consider, for example, the case of parents who, before leaving their teenage son alone in the house for the weekend, warn him, " You will be punished if you throw a party or engage in any other activity that damages the house." If the son nevertheless throws a party and is caught, he should hardly be able to avoid punishment by arguing that the house was not damaged. The parents proscribed (1) a party, and (2) any other activity that damages the house. As far as appears from what they said, their reasons for prohibiting the home-alone party may have had nothing to do with damage to the house— for instance, the risk that underage drinking or sexual activity would occur. And even if their only concern was to prevent damage, it does not follow from the fact that the same interest underlay both the specific and the general prohibition that proof of impairment of that interest is required for both. The parents, foreseeing that assessment of whether an activity had in fact " damaged" the house could be disputed by their son, might have wished to preclude all argument by specifying and categorically prohibiting the one

activity— hosting a party&[illegible]'; that was most likely to cause damage and most likely to occur.

540 U.S. at 27-28, 124 S.Ct. 376.

[10] These circuits, whose approach we discuss later in this opinion, nevertheless inject the statute with a proximate cause requirement through alternative means. *See Monzel*, 641 F.3d at 535; *Aumais*, 656 F.3d at 153.

[11] This disagreement does not mean that our plain-meaning analysis is fraught with any ambiguity. This court considers a statute ambiguous when a statute is subject to more than one reasonable interpretation or more than one accepted meaning. *See Carrieri*, 393 F.3d at 518-19. Even though we choose a course that differs from that of our sister circuits, a division of judicial authority is not enough to render a statute ambiguous. *See Reno v. Koray*, 515 U.S. 50, 64-65, 115 S.Ct. 2021, 132 L.Ed.2d 46 (1995) (discussing this principle in context of rule of lenity). Any " seeming agreement on a standard [in our sister circuits] suggests more harmony than there is." *United States v. Kearney*, 672 F.3d 81, 96 (1st Cir.2012). The First Circuit has correctly observed that the various circuits have applied a proximate cause test to similar, if not identical facts, yet reached differing outcomes that " cannot be entirely explained by differences in the facts of record." *See id.* *Compare Monzel*, 641 F.3d at 537-40 (concluding that proximate cause shown but remanding to determine the amount of harm so caused) and *McDaniel*, 631 F.3d at 1209 (holding that the district court did not clearly err in finding proximate cause) *with McGarity*, 669 F.3d at 1267-70 (concluding that proximate cause was not established), *Aumais*, 656 F.3d at 154-55 (same), and *Kennedy*, 643 F.3d at 1263-65 (same).

[12] The dissenting opinion authored by Judge Davis criticizes the majority analysis's inconsistency with *Porto Rico Railway*. Like the Eleventh Circuit, however, Judge Davis's dissent fails to properly account for the statute in that opinion and § 2259's significantly differing contexts. Like the Ninth Circuit, this dissenting opinion attempts to cloak the entire statute with a proximate causation requirement with only scant and scattered causal language as support; the dissenting opinion also resorts to language that applies to the procedures with which restitution is issued and enforced within § 3664 to improperly bolster its position. While making the same errors as our sister circuits, the dissenting opinion does not explain why the rule of last antecedent does not apply. Its position is ultimately unpersuasive.

Judge Southwick's dissenting opinion does not agree with Judge Davis's analysis, but it would similarly resort to the language of § 3664 and § 3663A to require proximate causation. The dissenting opinions are correct that § 2259 directs that " [a]n order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A." Judge Southwick's dissenting opinion construes this language to re[illegible] application of § 3663A's definition of victim as " a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered." Congress' directive to rely on the procedures guiding issuance and enforcement of a restitution order, however, does not require us to rely on the substantive definition of " victim" contained in a separate statute when § 2259 has already supplied courts with a different, broader definition of victim.

Lastly, Judge Davis's dissenting opinion claims that under our holding, " if Amy were injured in an automobile accident on the way to a counseling session, those damages would be included in a restitution award." This is not what the majority opinion suggests. Rather, the majority refuses to artificially divide responsibility for a crime victim's losses in circumstances like these here, where multiple defendants are realistically responsible for the victim's indivisible injury. While the dissent attempts to correct this error by adopting a collective causation theory, in doing so, it resorts to an unnecessary source in order to graft upon the clearly-worded statute a causation requirement. Ultimately the dissenting opinion's errors arises from its confusion of the " victim" inquiry which is antecedent to the calculation of " total losses."

[13] In stark contrast, other restitution statutes contain more forceful causation requirements that are lacking in § 2259. *Compare* 18 U.S.C. § 3663A(a)(2) (explaining that a victim is " a person directly and proximately harmed as a result of the commission of an offense") *with id.* § 2259(c) (defining a victim as " the individual harmed as a result of a commission of a crime").

[14] Any possible difficulty in ordering restitution in these cases arises not from the statutory construction, but from the type of crime underlying these appeals. It is quite possible that no other crime is like the crime of distribution, receipt, and possession of child pornography punishable under § 2252: No other crime involves single victims harmed jointly by defendants acting independently in the country. *See Burgess*, 684 F.3d at 461 (Gregory, J., concurring in part, dissenting in part, and concurring in judgment) (discussing the indivisibility of the injury to victims of child pornography crimes). Yet, the unique factual scenario that undergirds the application of this restitution statute need not muddle our analysis. We cannot interpret this statute to reach a result unsupported by its plain terms. *See Germain*, 503 U.S. at 254, 112 S.Ct. 1146 (quoting *Rubin*, 449 U.S. at 430, 101 S.Ct. 698) (explaining that where " the words of a statute are unambiguous, then, this first canon is also the last: ' judicial inquiry is complete.' "); *see also In re Amy*, 591 F.3d at 797 (Dennis, J., dissenting) (" Congress intended to afford child victims ample and generous protection and restitution, not to invite judge-made limitations patently at odds with the purpose of the legislation.").

[15] As Judge Davis's dissenting opinion points out, § 3664(h) fully reads:

If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution *or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant.* (emphasis added).

Judge Davis's dissenting opinion would read the italicized portion of 3664(h) to allow district courts the discretion to circumvent § 2259's command to award a crime victim the full amount of his or her losses. Thus, § 2259 dictates that the circumstances underlying child pornography convictions under § 2252 do not permit division of liability for reasons this opinion has already explained; the injury victims like Amy suffer does not produce a loss capable of division. *See* note 14 *supra*. We echo the criticism of this approach embodied in Judge Southwick's dissenting opinion:

In light of the unique nature of prosecutions of child pornography and the clear congressional intent to maximize awards, any doubts about the proper amount of restitution should be resolved in favor of the child .... I am concerned that [Judge Davis's] emphasis on the discretion of a district court ... tends towards accepting inappropriately low, even nominal awards. I would not accept that a forward-looking estimate of the number of future defendants and awards should be used to estimate a percentage of overall liability to be given a particular defendant. That puts too much weight on the interests of the defendants. Over-compensation is an unlikely eventuality.

[16] Writing separately in the Fourth Circuit's recent opinion analyzing § 2259, Judge Gregory explained the indivisibility of pornography victims' harms:

If [a defendant] proximately caused [a victim like Amy]'s psychological injury, this injury is indivisible from the psychological injuries proximately caused by the other offenders. I do not believe a fact finder could meaningfully say precisely *x* amount of [the victim]'s psychological injuries were caused by [the defendant]'s watching the same video. *Burgess*, 684 F.3d at 461 (Gregory, J., concurring in part, dissenting in part, and concurring in judgment).

[17] Use of this mechanism does not violate § 3664(f)(1)(B)'s command that courts may not consider a victim's receipt of compensation from other sources " in determining the amount of restitution" because § 2259 limits a victim's recovery to the full amount of his or her losses. Section 2259(b)(4)(B)'s similar instruction that a court may not decline to issue a restitution order " because of ... the fact that a victim has, or is entitled to, receive compensation for his or her injuries from ... any other source" reinforces this conclusion. Section 2259(b)(4)(B), read together with § 3664(b), (f)(1)(B), reinforces the mandatory nature of § 2259 by disallowing district courts from declining to issue restitution to crime victims while simultaneously honoring the cap § 2259 places on victims' recovery: the full amount of a victim's losses.

[18] Of course, even while Amy may not collect more than to which she is entitled, she may certainly obtain judgments in excess of that amount. Indeed, Amy has already obtained judgments exceeding $3.4 million.

[19] The comprehensive information the Government has provided in this case regarding the restitution ordered in other cases involving Amy confirms the Government's access to this type of information.

[20] Nothing in § 2259, § 3664, or in this opinion is intended to restrict the district court's ability to use any other mechanisms available under § 3664 to order restitution in a manner that effects § 2259's purposes.

[21] Amy's motion to strike portions of the Government's brief is DENIED.

[1] Section 2259 directs courts to " order restitution for any offense under this chapter." District courts do not have discretion to make no award.

[2] The majority would apparently hold that if Amy were injured in an automobile accident on the way to a counseling session, those damages would be included in a restitution award.

[3] I am not persuaded by *In re Amy* 's attempt to distinguish the statute in *Porto Rico Railway* on the basis that the subcategories of § 2259(b)(3) are separated by semicolons rather than commas. *See In re Amy Unknown*, 636 F.3d 190, 199 (5th Cir.2011). Either punctuation device is an acceptable method of separating clauses. *See* BRYAN A. GARNER, THE REDBOOK: A MANUAL ON LEGAL STYLE 1-15 (2d. ed.2006).

[4] The Government argued that contribution would not apply in this context because the statute did not authorize it and, in any event, it would not apply among defendants convicted in different courts; but their authority on this point is very thin and does not directly and strongly support this view.

Appendix C
Opinion on Panel Rehearing

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636 F.3d 190 (5th Cir. 2011)

In re: AMY UNKNOWN, Petitioner.

United States of America, Plaintiff-Appellee,

Doyle Randall Paroline, Defendant-Appellee,

v.

Amy Unknown, Movant-Appellant.

Nos. 09-41238, 09-41254.

United States Court of Appeals, Fifth Circuit.

March 22, 2011

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Amanda Louise Griffith, Asst. U.S. Atty., U.S. Attorney's Office, Eastern District of Texas, Plano, TX, William D. Baldwin, Traci Lynne Kenner (argued), Asst. U.S. Attorneys, U.S. Attorney's Office, Eastern District of Texas, Tyler, TX, for U.S.

Appeals from the United States District Court for the Eastern District of Texas.

Before JONES, Chief Judge, and JOLLY and GARZA, Circuit Judges.

EDITH H. JONES, Chief Judge:[1]

" Amy," the victim of childhood sexual abuse and of a widely broadcast set of photos depicting her abuse, has pursued restitution under the Crime Victims Rights' Act (" CVRA"), 18 U.S.C. § 3771(a)(6), against defendants who viewed her photos on the internet. Her appeal from the district court's denial of relief arrives in an unusual posture. She filed both a direct appeal under 28 U.S.C. § 1291 and a petition for a writ of mandamus under 18 U.S.C. § 3771(d)(3). A panel of this court denied mandamus. *In re Amy*, 591 F.3d 792 (5th Cir.2009). This panel was assigned, for ease of administration, both the direct appeal and Amy's

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motion for panel rehearing of her mandamus petition. We need not reach the issue whether a crime victim has a right to a direct appeal, because the district court clearly and indisputably erred in grafting a proximate causation requirement onto the CVRA. Consequently, Appellant's petition for panel rehearing is granted; her petition for a writ of mandamus is likewise granted, and the case is remanded to the district court to determine the amount of restitution owed by Doyle Randall Paroline.

I. Background

The National Center for Missing and Exploited Children (" NCMEC"), which filed a brief in the district court, reports that its analysts have identified over 35,000 images of Amy's abuse among the evidence in over 3,200 child pornography cases since 1998. NCMEC describes the content of these images as " extremely graphic."

Images of Amy were among the hundreds of images of child sexual abuse that defendant Doyle Randall Paroline possessed. Paroline pled guilty to possession of child pornography in January 2009. At sentencing, Amy filed a victim impact statement and request for restitution.[2] *See* 18 U.S.C. § 2259(a). The latter sought $3,367,854, the cumulative cost of her lost income, attorney's fees, and ongoing psychological care. The government initially supported (and formally presented) Amy's request for restitution. NCMEC also filed a brief that detailed the lasting impact of sexual assault and the victim's additional suffering from the knowledge that people continue to view and circulate images of her abuse. Additional evidence before the district court included an expert evaluation of Amy's psychological condition, economic report estimating her lost earnings, and scholarly articles regarding the general effects of child pornography. *United States v. Paroline*, 672 F.Supp.2d 781, 792 (E.D.Tex.2009).

Notwithstanding the heartrending evidence, the district court denied Amy's request for restitution. The court held that the CVRA required Amy and the government to prove that Paroline's possession of Amy's images— as distinct from the thousands of other individuals who continue to possess and view the images— proximately caused the injuries for which she sought restitution. *Id.* at 791-92. The government, in advancing Amy's restitution claim, now accepts the court's premise that proximate causation is required for all types of injury listed in § 2259.

Amy immediately appealed the district court's decision. She filed both a direct appeal of the court's final

order and a petition for writ of mandamus authorized by the CVRA, 18 U.S.C. § 3771(d)(3). A divided panel of this court refused the mandamus request, upholding the district court's conclusion that proximate causation permeates § 2259. *In re Amy*, 591 F.3d 792, 794-95 (5th Cir.2009) (" Although this circuit has not yet construed the proximate cause requirement under Section 2259, it is neither clear nor indisputable that Amy's contentions regarding the statute are correct."). In response, Amy has sought both panel and en banc rehearing of her mandamus petition. Because her direct appeal

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was assigned to this panel, this panel was also assigned for purposes of rehearing the petition for mandamus.[3]

II. Jurisdiction

The first question before this court is what sort of jurisdiction we have to review the district court's order. Given our conclusion that the writ of mandamus should be granted, we need not resolve the problem, posed by divided sister circuit opinions, whether the CVRA allows a victim to bring a direct appeal. The difficulty of this issue ought to be explained, however, for the benefit of future panels.

The CVRA provides that: " If the district court denies the relief sought, the movant [victim] may petition the court of appeals for a writ of mandamus." 18 U.S.C. § 3771(d)(3). As to the government, " In any appeal in a criminal case, the Government may assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates." 18 U.S.C. § 3771(d)(4). The CVRA does not state that victims' sole avenue for review is the writ of mandamus, nor does it authorize the government alone to bring a direct appeal.[4] In any event, 28 U.S.C. § 1291 generally authorizes direct appeal by parties aggrieved by final district court judgments.

The government moved to dismiss Amy's direct appeal filed under § 1291, contending that mandamus is her exclusive appellate vehicle. The CVRA's express provisions confirm this proposition, according to the government and Paroline, abetted by the interpretive presumption that Congress has " legislated against the background of our traditional legal concepts...." *United States v. United States Gypsum Co.*, 438 U.S. 422, 437, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978). Prominent among the relevant legal traditions is that non-parties may not file appeals. The Supreme Court has long recognized " [t]he rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment...." *Marino v. Ortiz*, 484 U.S. 301, 304, 108 S.Ct. 586, 98 L.Ed.2d 629 (1988) (citing *United States ex rel. Louisiana v. Jack*, 244 U.S. 397, 402, 37 S.Ct. 605, 61 L.Ed. 1222 (1917)). Crime victims have not been recognized as parties, and the Federal Rules of Criminal Procedure do not allow them to intervene as parties to a prosecution. Circuit courts have applied this rule in the context of restitution. Under the Victim and Witness Protection Act (VWPA), the CVRA's predecessor that made restitution an option rather than mandatory, the Ninth Circuit held that " [n]owhere in the statute does Congress suggest that the VWPA was intended to provide victims with a private remedy to sue or appeal restitution decisions...."

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United States v. Mindel, 80 F.3d 394, 397 (9th Cir.1996).[5] The government contends that decades of experience, a general prohibition on non-party appeals, and its application in the context of victims' rights stand against Amy's hope to invoke § 1291 to appeal the denial of restitution.

Moreover, a pair of recent decisions expressly denies direct appeals under the CVRA. *See United States v. Hunter*, 548 F.3d 1308 (10th Cir.2008), *United States v. Aguirre-Gonzalez*, 597 F.3d 46 (1st Cir.2010). *Hunter* anchored its statutory interpretation in three provisions of the CVRA: the authorization of mandamus review for victims, the government's ability to bring a direct appeal on a victim's behalf, and the statement that " [n]othing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." *Id.* at 1315-16 (quoting 18 U.S.C. § 3771(d)(5)). The first two provisions support *Hunter* 's conclusion by simple negative implication. The last of them, according to the court, implies that affording victims full appellate rights could compromise the government's ability to enter plea agreements because a victim's appeal could re-open the negotiated judgment, removing the certainty that motivates defendants to settle. *Id.Hunter* also suggests that precedent from other circuits supports its conclusion. It cites two decisions that applied traditional abuse-of-discretion standards while professing to conduct mandamus review. *Id.* at 1315 n. 5 (citing *Kenna v. U.S. Dist. Court*, 435 F.3d 1011, 1017 (9th Cir.2006), *In re W.R. Huff Asset Management Co., LLC*, 409 F.3d 555, 562-63 (2d Cir.2005)). By " disguising" ordinary appellate review as mandamus review in § 3771(d)(3) petitions, these decisions support the conclusion that victims have no right to a direct appeal: " To hold otherwise would effectively grant victims two opportunities to appeal, both of which would be subject to identical appellate standards of review— a clearly inefficient and illogical scheme." *Id.* [6]

Amy asserts that the propriety of her direct appeal is not expressly foreclosed by the CVRA and actually finds support in pre-CVRA authorities— as Congress is presumed to have been aware— as well as recent caselaw. Before the passage of the CVRA, this court heard appeals from non-parties with a direct interest in aspects of criminal prosecutions. *United States v. Briggs*, 514 F.2d 794 (5th Cir.1975) (holding that unindicted co-conspirators had standing to challenge

passages in an indictment);

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United States v. Chagra, 701 F.2d 354 (5th Cir.1983) (allowing newspaper to appeal order restricting access to court hearing). A rape victim was authorized in *Doe v. United States*, 666 F.2d 43, 46 (4th Cir.1981), to appeal the trial court's ruling on a rape shield law. Most important, the Third Circuit held, albeit perfunctorily, that " We have appellate jurisdiction pursuant to 28 U.S.C. § 1291" to hear the appeal of a purported victim seeking restitution under the VWPA. *United States v. Kones*, 77 F.3d 66, 68 (3rd Cir.1996). Based on the conflicting pre-CVRA cases cited by Amy and the government, one may legitimately wonder *which* legal landscape Congress is presumed to have been viewing when it crafted the CVRA.

The Third Circuit also ruled, in a split panel decision issued while the CVRA was under consideration in Congress, that a crime victim could appeal pursuant to § 1291 the district court's method of enforcing the restitution order. *United States v. Perry*, 360 F.3d 519 (6th Cir.2004).[7]

Finally, post-CVRA, the Sixth Circuit offered indirect support for Amy's position when it allowed a direct appeal under the CVRA. *See In re Siler*, 571 F.3d 604 (6th Cir.2009). Although the events in *Siler* began with a criminal investigation, the lawsuit at issue was a civil action against the police for violations of 42 U.S.C. § 1983. The plaintiffs hoped to use a provision of the CVRA to gain access to the defendants' Presentence Reports (PSRs), which they believed contained evidence that would support their case. *Id.* at 607-08. In accepting the appeal, however, the Sixth Circuit noted that " the issue now before us is unrelated to the [criminal] case against the defendants." [8] *Id.* at 606-07.

To summarize briefly the arguments and authorities cited by the " parties" is not to resolve whether a § 1291 appeal is available to a victim seeking relief for any of her rights, including restitution, under the CVRA. Resolution is difficult because the cases employ conflicting reasoning. *Perry*, which involved a dispute among victims who were to share an award, focused on the victims' property rights in their restitution. 360 F.3d at 530-31. *Kones* and *Hunter* concerned denials of restitution, but the former permitted appeal under the optional-restitution VWPA, while the latter denied appeal under the mandatory-restitution CVRA. The cases also ignore their predecessors: *Perry* fails to acknowledge *Kones*, while *Hunter* does not cite either *Perry* or *Kones*. Federal victim rights

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legislation has steadily evolved toward expanding the formal rights and role of victims in the prosecutorial process. Nevertheless, when Congress as recently as the 1980s failed to offer " appellate rights to review restitution orders, which path did it more likely take when creating appellate redress in the CVRA? Did it *add* the mandamus vehicle to a victim's pre-existing right to appeal under § 1291? Or did it craft " mandamus" in lieu of a non-existent direct appeal right for non-parties? If the latter course was chosen, did Congress render to victims a mere formality, given the traditionally narrow scope of mandamus relief, or did it apply that term to a more substantial vehicle for redress of victims' grievances? We need not resolve the uncertainties, because our analysis leads to the conclusion that, even under the narrow standard of traditional mandamus review, the district court's judgment cannot stand. This conclusion would perforce favor Amy if a § 1291 de novo appellate standard applied.

III. Standard of Review

When a panel rehearing is granted, the standard of review is the same one that applied at the original hearing. *See, e.g., Chicago Bridge & Iron Co. N.V. v. FTC*, 534 F.3d 410, 422 (5th Cir.2008). This court evaluates a petition for writ of mandamus under the CVRA according to the standard announced in *In re Dean*, 527 F.3d 391 (5th Cir.2008). *Dean* held that mandamus is appropriate " only if (1) the petitioner has no other adequate means to attain the desired relief; (2) the petitioner has demonstrated a right to the issuance of a writ that is clear and indisputable; and (3) the issuing court ... is satisfied that the writ is appropriate under the circumstances." *Id.* at 394 (internal quotations omitted). In announcing the test for mandamus under the CVRA, the *Dean* decision refers to this court's holding in *In re United States*, 397 F.3d 274 (5th Cir.2005), as well as the Supreme Court's decision in *Cheney v. United States District Court*, 542 U.S. 367, 124 S.Ct. 2576, 159 L.Ed.2d 459 (2004), neither of which concerns the CVRA or restitution. By relying on general mandamus precedent, *In re Dean* confirms that a single mandamus standard reigns in the Fifth Circuit, regardless of the context in which the petition arises.[9]

IV. Discussion

As the Supreme Court has noted, the " hurdles" limiting use of mandamus,

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" however demanding, are not insuperable." *Cheney*, 542 U.S. at 381, 124 S.Ct. 2576. This court's initial denial of Amy's petition for a writ of mandamus focused on the second of the three *Cheney* factors— *i.e.*, whether Amy's right to restitution is " clear and indisputable." The other two factors played no part in the denial. As to the first factor, the court cited the Tenth Circuit's *Hunter* decision in holding that " the petitioner likely has no other means for obtaining review of the district court's decision not to order restitution." *In re Amy*, 591 F.3d at 793. Based on the preceding discussion, we can affirm

this conclusion without endorsing [illegible]r's holding that a victim has no right to direct appeal. "

Likewise, the third factor in *Cheney* — whether the writ is appropriate under the circumstances— favors Amy's petition. Whatever Congress envisioned regarding a victim's right to direct appeal, the CVRA expressly authorizes mandamus under these circumstances. 18 U.S.C. § 3771(d)(3).

The remaining question is whether Amy has a " clear and indisputable" right to restitution. Given more time to ponder and research, we have reconsidered this question. Courts are required to award victims of child sex abuse " the full amount of the victim's losses." 18 U.S.C. § 2259(b)(1). In this context,

" full amount of the victim's losses" includes any costs incurred by the victim for—

(A) medical services relating to physical, psychiatric, or psychological care;

(B) physical and occupational therapy or rehabilitation;

(C) necessary transportation, temporary housing, and child care expenses;

(D) lost income;

(E) attorneys' fees, as well as other costs incurred; and

(F) any other losses suffered by the victim as a proximate result of the offense.

18 U.S.C. § 2259(b)(3).

The district court denied Amy's request for restitution because the government failed to prove " what losses, if any, were proximately caused by *Paroline's possession* of Amy's two pornographic images...." *United States v. Paroline*, 672 F.Supp.2d 781, 783 (E.D.Tex.2009) (emphasis added). It reasoned that the statute, precedent, and compliance with the Eighth Amendment compel the conclusion that each category of loss in § 2259(b)(3) includes the element of proximate causation, even though the statute confines that requirement to the " catchall" provision, subsection F. This conclusion is clearly and indisputably wrong.

The structure and language of § 2259(b)(3) impose a proximate causation requirement only on miscellaneous " other losses" for which a victim seeks restitution. As a general proposition, it makes sense that Congress would impose an additional restriction on the catchall category of " other losses" that does not apply to the defined categories. By construction, Congress knew the kinds of expenses necessary for restitution under subsections A through E; equally definitionally, it could not anticipate what victims would propose under the open-ended subsection F.

Comparing the language of § 2259 with other restitution statutes affirms the conclusion that proximate causation applies only to the catchall category of harms. Under the VWPA, a victim is " a person *directly and proximately* harmed as a result of the commission of an offense...."

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18 U.S.C. § 3663A(a)(2) (emphasis added). In contrast, § 2259, enacted 14 years later as part of the MVRA, defines a victim as " the individual harmed as *a result of* a commission of a crime...." 18 U.S.C. § 2259(c) (emphasis added). [10] Comparing these statutes reveals that Congress abandoned the proximate causation language that would have reached all categories of harm via the definition of a victim. This change is consistent with the reasons for enacting a second generation of restitution statutes. *See, e.g., Unites States v. Ekanem*, 383 F.3d 40, 44 (2d Cir.2004) (noting " the intent and purpose of the MVRA to expand, rather than limit, the restitution remedy."), *United States v. Perry*, 360 F.3d 519, 524 (6th Cir.2004) (" The new law unquestionably reflects a dramatically more ' pro-victim' congressional attitude...."). The evolution in victims' rights statutes demonstrates Congress's choice to abandon a global requirement of proximate causation.

In applying proximate causation beyond the catchall, the district court cited two Supreme Court cases interpreting statutory lists. *Paroline*, 672 F.Supp.2d at 788 (citing *Porto Rico Railway, Light & Power Co. v. Mor*, 253 U.S. 345, 40 S.Ct. 516, 64 L.Ed. 944 (1920), *Fed. Mar. Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 93 S.Ct. 1773, 36 L.Ed.2d 620 (1973)). In *Porto Rico Railway*, the Supreme Court stated that " When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." *Id.* at 348, 40 S.Ct. 516.

But there are lists, and then there are other lists. Here, the statute does not present the types of recoverable costs in a series, separated by commas. Instead, it begins a sentence (" ' full amount of the victim's losses' includes any costs incurred by the victim for— ") and then lists six different endings for that sentence. From the double-dash that opens the list to the semicolons that separate each of its elements, the grammatical structure of § 2259(b)(3) is unlike the statute in *Porto Rico Railway*. The latter was a blurry composite of lists, separated by commas and without any numbering or introductory punctuation.[11] Grammar alone counsels against applying the rule of *Porto Rico Railway* to the current statute.

Even if the interpretive approach of *Porto Rico Railway* applied here, so would the Court's comment that the statute in question " manifests a general purpose ... [and i]f the application of the cause were doubtful, we

should so construe the provision[ ] to effectuate the general purpose of Congress." *Id.* In one case of § 2259, the statute manifests a congressional purpose to award broad restitution.

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See United States v. Crandon, 173 F.3d 122, 126 (3d Cir.1999) (" Congress [in § 2259] mandated broad restitution for a minor victim...."), *United States v. Laney*, 189 F.3d 954, 966 (9th Cir.1999) (" Section 2259 is phrased in generous terms, in order to compensate the victims of sexual abuse for the care required to address the long term effects of their abuse."). In light of the recognized purpose for which Congress crafted the list in § 2259(b)(3), a more faithful application of *Porto Rico Railway* would confine the proximate causation requirement to the catchall category of subsection F.

The district court relied on another Supreme Court case addressing an interpretive question that is the inverse of the one here. *Fed. Mar. Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 93 S.Ct. 1773, 36 L.Ed.2d 620 (1973). The statute in *Seatrain* included a seven-category list like the one in § 2259(b)(3). All but one of the categories referred to business relationships that were ongoing. The remaining category was ambiguous, and the Federal Maritime Commission sought to use it to regulate a one-time event. *Id.* at 732-33, 93 S.Ct. 1773. The question before the Court, therefore, was unlike the present case: whether to apply a condition present in all but one category to the sole outlier (as opposed to applying a restriction present in only one category to all of the others, as the district court did here). The Supreme Court resolved this question by looking to all six of the other categories and following their example: " of the seven categories, six are expressly limited to ongoing arrangements...." *Id.* at 733-34, 93 S.Ct. 1773. The Court found it especially significant that the catchall category shared the restriction. *Id.* at 734, 93 S.Ct. 1773.

Here, the district court seizes on *Seatrain* 's comments about catchall categories to justify a proximate causation requirement, which appears in the catchall, subsection F. *Paroline*, 672 F.Supp.2d at 788. This is a misapplication of *Seatrain*. In *Seatrain*, the special role of a catchall category was not determinative because the catchall imposed the same condition as the other uncontested categories. It is just as likely that the Court's other rationale— majority rule among the categories— controlled the outcome. Moreover, the treatise from which the Court drew its interpretation of catchalls includes the following restriction: " But this is so, only if the result is consistent with the legislative intent.... The rule will not be applied where there is ' no ambiguity,' or to thwart the legislative intent...." 2 J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 4908 (3d ed.1943). The Supreme Court understood this restriction. As in *Porto Rico Railway*, the Court in *Seatrain* took its cues from " the statutory scheme" and what it says about congressional intent. 411 U.S. at 73[illegible] S.Ct. 1773. As illustrated in the citations above, congressional intent is no mystery in the context of § 2259. Had the district court adhered more closely to the precedent it cited, it would have reached the opposite conclusion.

Restricting the " proximate result" language to the catchall category in which it appears does not open the door to limitless restitution. The statute itself includes a general causation requirement in its definition of a victim: " For purposes of this section, the term ' victim' means the individual harmed *as a result* of a commission of a crime under this chapter..." 18 U.S.C. § 2259(c) (emphasis added). The district court displayed due care in analyzing whether Amy is a victim of Paroline's crime of possessing— but not creating— images of her sexual assault. *Paroline*, 672 F.Supp.2d at 785-87. The

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finding that Amy is a victim under § 2259(c) rests on the Supreme Court's reasoning in *New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982) as well as this court's holding in *United States v. Norris*, 159 F.3d 926 (5th Cir.1998).[12] In *Norris* this court rejected the argument that possessors of child pornography are only an " indirect or secondary" cause of the victim's harm. 159 F.3d at 928-29. Given the statute's built-in causation requirement and the volume of causation evidence in the context of child pornography, fears over excessive punishment are misplaced. We therefore do not share the district court's concern that rejecting a proximate causation requirement would place § 2259 in danger of offending the Eighth Amendment. *See Paroline*, 672 F.Supp.2d at 788 n. 9.

A second reason to doubt that Paroline will pay an unconstitutional price for his crime is the possibility that he can seek contribution from other persons who possess Amy's images. Although the statute holds a criminal responsible for " the full amount of the victim's losses," 18 U.S.C. § 2259(b)(1), it instructs the court to enforce the restitution award " in accordance with section 3664," 18 U.S.C. § 2259(b)(2). Section 3664 states that the court may enforce a restitution order " by all other available and reasonable means." 18 U.S.C. § 3664(m)(1)(A)(ii). Among these is joint and several liability. Holding wrongdoers jointly and severally liable is no innovation. *See, e.g.*, 42 U.S.C. § 9607(a) (CERCLA). It will, however, enable Paroline to distribute " the full amount of the victim's losses" across other possessors of Amy's images. Among its virtues, joint and several liability shifts the chore of seeking contribution to the person who perpetrated the harm rather than its innocent recipient.

This court offers no opinion on the amount of restitution due in Amy's particular circumstances. The district court has conducted two evidentiary hearings already. It is best qualified to determine Amy's total harm and the fraction due to Paroline's crime.

V. Conclusion

Incorporating a proximate causation requirement where none exists is a clear and indisputable error. Amy is entitled to receive restitution under the CVRA. We therefore GRANT Amy's petition for panel rehearing and likewise GRANT her petition for a writ of mandamus. Because the district court did not quantify the amount of restitution to which Amy is entitled or the fraction attributable to Paroline, the

case is REMANDED for resolution of that issue.

Notes:

[1] Judges JOLLY and GARZA concur, except in Part II, which they consider advisory.

[2] Although the present lawsuit focuses on restitution, the CVRA guarantees a number of other rights as well. Among these are (1) reasonable protection from the accused, (2) notice of any court or parole proceedings involving the accused, (3) attendance at such proceedings, (4) an opportunity to be heard at proceedings involving release, plea, sentencing or parole, (5) communication with the government's attorney in the case involving the victim, (6) avoidance of delay, and (7) " [t]he right to be treated with fairness and with respect for the victim's dignity and privacy." 18 U.S.C. § 3771(a).

[3] This court heard oral arguments in Amy's direct appeal on November 4, 2010. The decision to hear arguments did not commit the court to a conclusion on the availability of direct appeal. We remain the rehearing panel for purposes of Amy's mandamus petition. *See United States v. Jackson*, 559 F.3d 368 (5th Cir.2009) (conducting panel rehearing of the decision issued by a differently composed prior panel in *United States v. Jackson*, 285 Fed.Appx. 149 (5th Cir.2008)).

[4] A related argument concerns the collateral order doctrine. The Supreme Court has recently reiterated the doctrine's rare applicability. *Mohawk Indus., Inc. v. Carpenter*, __ U.S. __, 130 S.Ct. 599, 175 L.Ed.2d 458 (2009). A condition for the collateral order doctrine is that the order at issue be " effectively unreviewable on appeal." *Id.* at 604. In the present case, the government argues that its ability to appeal a restitution order defeats this condition; Amy contends that such an order remains effectively unreviewable *as to her*. We present this controversy but need not resolve it.

[5] The Ninth Circuit was not alone in its interpretation of the VWPA. *See United States v. Palma*, 760 F.2d 475, 479 (3d Cir.1985) (" the victim ... is not made a party to the sentencing proceeding"), *United States v. Brown*, 744 F.2d 905, 909-10 (2d Cir.1984) (" the victim is not a party to the sentencing[ing.... Neither can be appeal a determination he deems inadequate."), *United States v. Franklin*, 792 F.2d 998, 999-1000 (11th Cir.1986) (" no statute ... give[s] us the authority to entertain an appeal by a victim, such as appellant, who was not a party to the sentencing proceeding in the district court."), *United States v. Kelley*, 997 F.2d 806, 807 (10th Cir.1993) (" We ... hold that [the victim] has no standing to prosecute this appeal.").

[6] If *Hunter* is correct that courts are cloaking their ordinary review in mandamus language, that fact suggests unease with denying victims a direct appeal, the very conclusion *Hunter* advances. As discussed below, this circuit insists on a single mandamus standard. As a corollary, this court can neither follow nor condone the shrouded direct review in *Huff* and *Kenna*. *See infra* Part III. The *Hunter* opinion also overlooks precedent that favors direct appeal. Neither *Hunter* nor its successor, *In re Antrobus*, 519 F.3d 1123 (10th Cir.2008), discusses the Sixth Circuit's decision in *United States v. Perry*, 360 F.3d 519 (6th Cir.2004). *Perry* distinguished the entire corpus of VWPA precedent for the fact that restitution was not mandatory under that statute, but *Hunter* cites no fewer than three such cases in support of its holding.

[7] Amy argues that statutory developments between the VWPA and the CVRA have nullified pre-CVRA holdings that victims have no independent rights in criminal prosecutions. This interpretation of the shift from " may," 18 U.S.C. § 3663(a)(1)(A), to " shall," 18 U.S.C. § 3663A(a)(1), has persuaded at least one court. *Perry*, 360 F.3d at 531 (" under the VWPA, a court did not have to award restitution.... Thus, particular features of the VWPA scheme— features absent from the [CVRA]— explain the decisions that deny standing to appeal a VWPA restitution order.").

[8] The Tenth Circuit has attempted to substantiate the distinction between victims' rights in civil and criminal contexts. *Hunter*, 548 F.3d at 1312. " Civil cases," that court reasoned, " often implicate the pecuniary rights of non-parties.... Criminal trials, of the other hand, place an individual citizen against the United States government." *Id.* To be fair, although *Hunter* was a CVRA case, it addressed the entire panoply of victims' rights contained in the statute. In the specific context of restitution, *Hunter* 's distinction could not be less accurate. A restitution order implicates only the pecuniary interests of a criminal defendant, and the dispute over how much restitution is due occurs between a criminal and his victim— in fact, the victim's ability to pursue this dispute without government involvement is precisely the issue in this case.

[9] We pause to note, as part of the jurisdictional conundrum, that our sister circuits are far from united in the standard to be applied. At least two circuits have applied lower standards of review when faced with a mandamus petition under the CVRA. *See Kenna v. U.S. Dist. Court*, 435 F.3d 1011, 1017 (9th Cir.2006) (" we

must issue the writ whenever we[ ] that the district court's order reflects an abuse of discretion or legal error"). *In re W.R. Huff Asset Management Co., LLC*, 409 F.3d 555, 562-63 (2d Cir.2005) (invoking § 3771(d)(3), the mandamus review provision, but concluding that " the district court's determination under the CVRA should be reviewed for abuse of discretion."). These standards appear to be more amenable to reversing the district court than the general mandamus standard. *Cf. In re The City of New York*, 607 F.3d 923, 928-29 (2d Cir.2010) (applying *Cheney* 's three-part test), *Perry v. Schwarzenegger*, 591 F.3d 1147, 1156 (9th Cir.2010) (citing *Cheney* and applying an equivalent five-part test from Ninth Circuit precedent). The Tenth Circuit, however, preceded this court in applying the traditional mandamus standard to a victim's appeal under the CVRA. *See In re Antrobus*, 519 F.3d 1123 (10th Cir.2008). As the Tenth Circuit explained, " [m]andamus is a well worn term of art in our common law tradition." *Id.* at 1127. Moreover, " [i]t is a well-established rule of construction that where Congress uses terms that have accumulated settled meaning under the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *Neder v. United States*, 527 U.S. 1, 21, 119 S.Ct. 1827, 1840, 144 L.Ed.2d 35 (1999).

[10] The CVRA contains a definition of " crime victim" that parallels the VWPA and incorporates proximate causation: " a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia." 18 U.S.C. § 3771(e). We focus on the MVRA definition, however, because Amy's claim to restitution rests on that statute. The district court appreciated this fact and therefore turned to a provision of the MVRA to find a proximate causation requirement, *viz.* § 2259(b)(3). To evaluate the district court's interpretation, we look to other sections of the same statute for guidance. The parties do not challenge whether Amy is a victim. Nevertheless, the MVRA's internal definition of victim is probative of the meaning of § 2259(b)(3).

[11] The relevant provision stated: " Said District Court shall have jurisdiction of all controversies where all of the parties on either side of the controversy are citizens or subjects of a foreign state or states, or citizens of a state, territory, or district of the United States not domiciled in Porto Rico...." *Porto Rico Ry.*, 253 U.S. at 346, 40 S.Ct. 516.

[12] The causation reasoning in *Norris* bears extended reproduction:

> The consumer, or end recipient, of pornographic materials may be considered to be causing the children depicted in those materials to suffer as a result of his actions in at least three ways.
>
> First, the simple fa[ ]t that the images have been disseminated perpetuates the abuse initiated by the producer of the materials....
>
> Second, the mere existence of child pornography represents an invasion of the privacy of the child depicted. Both the Supreme Court and Congress have explicitly acknowledged that the child victims of child pornography are directly harmed by this despicable intrusion on the lives of the young....
>
> Third, the consumer of child pornography instigates the original production of child pornography by providing an economic motive for creating and distributing the materials....
>
> Any of these effects, stemming directly from a consumer's receipt of or willingness to receive child pornography, would amply justify the conclusion that a child depicted in the pornographic images was a " victim" of that crime. 159 F.3d at 929-30.

Appendix D
Initial Panel Opinion

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591 F.3d 792 (5th Cir. 2009)

In re: AMY, the Victim in the Misty Child Pornography Series, Petitioner.

No. 09-41238.

United States Court of Appeals, Fifth Circuit.

December 21, 2009

As Revised Dec. 22, 2009.

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Fred Rimes Files, Jr., Bain, Files, Jarrett, Bain & Harrison, Tyler, TX, for Paroline.

William D. Baldwin, Amanda Louise Griffith, Traci Lynne Kenner, Asst. U.S. Attys., Tyler, TX, for U.S.

Petition for Writ of Mandamus to the United States District Court for the Eastern District of Texas.

Before DAVIS, SMITH and DENNIS, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

Petitioner, proceeding under the pseudonym " Amy," seeks a writ of mandamus directing the district court to enter an order requiring defendant Doyle Randall Paroline (" Paroline") to pay victim restitution to her in the amount of $3,367,854. Alternatively, petitioner asks us to remand this case to the district court for reconsideration of its order declining to impose restitution against Paroline. Because the district court's conclusion[1] that the government failed to establish that any of the defendant's conduct related to this offense proximately caused Amy's damages is not indisputably wrong, we DENY the writ of mandamus.

The standard of review is the usual standard for mandamus petitions, as set forth in *In re Dean*, 527 F.3d 391 (5th Cir.2008). " A writ of mandamus may issue only if (1) the petitioner has ' no other adequate means' to attain the desired relief; (2) the petitioner has demonstrated a right to the issuance of a writ that is ' clear and indisputable; ' and (3) the issuing court, in the exercise of its discretion, is satisfied that the writ is ' appropriate under the circumstances.' " *Id.* at 394 (quoting *In Re United States*, 397 F.3d 274, 282 (5th Cir.2005)).

In this case, the first requirement is fulfilled because the petitioner likely has no other means for obtaining review of the district court's decision not to order restitution. *See United States v. Hunter*, 548 F.3d 1308, 1311-16 (10th Cir.2008) (holding that a victim may not bring an appeal from a final judgment in a criminal case asserting that her rights under § 3771 were violated). However, we are not persuaded that the second requirement is met.

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Approximately a decade ago, when petitioner was 8 or 9 years old, her uncle took a series of photographs depicting her in sexually abusive poses. Her uncle distributed the sexually abusive images to third parties and, over the ensuing decade, those images were distributed widely via the internet and other electronic means. Defendant Doyle Randall Paroline (" Paroline") pleaded guilty to a single count of possessing material involving the sexual exploitation of children in violation 18 U.S.C. §§ 2252(a)(4)(B) & 2252(b)(2), stemming from the large number of images of children engaged in sexually explicit conduct that were found on Paroline's computer. Two of the sexually abusive images were those made of Petitioner when she was 8 or 9 years old.

The Government moved in the district court on petitioner's behalf, and petitioner moved through her own counsel, for restitution pursuant to 18 U.S.C. § 2259. The statute provides that the district court " shall order restitution for any offense under this chapter," which includes the offenses for which Paroline was convicted. 18 U.S.C. § 2259(a). " The order of restitution under this chapter shall direct the defendant to pay the victim ... the full amount of the victim's losses as determined by the court." *Id.* § 2259(b)(1). A " victim" for purposes of the statute " means the individual harmed as a result of a commission of a crime under this chapter." *Id.* § 2259(c). " The full amount of the victim's losses," for purposes of the statute, " includes any costs incurred by the victim for-

(A) medical services relating to physical, psychiatric, or psychological care;

(B) physical and occupational therapy or rehabilitation;

(C) necessary transportation, temporary housing, and child care expenses;

(D) lost income;

(E) attorneys' fees, as well as other costs incurred; and

(F) any other losses suffered by the victim as a proximate

result of the offense."

Id. § 2259(b)(3).

Section 2259(b)(3) therefore arguably requires the government to establish that recoverable damages must proximately result from the " offense"

We agree with the district court that

[I]f the Court were to adopt Amy's reading of section 2259 and find that there is no proximate cause requirement in the statute, a restitution order could hold an individual liable for a greater amount of losses than those caused by his particular offense of conviction. This interpretation would be plainly inconsistent with how the principles of restitution and causation have historically been applied.

The crux of Amy's petition is the legal argument that 18 U.S.C. § 2259 permits a victim to receive mandatory restitution irrespective of whether the victim's harm was proximately cause by the defendant. The government agreed with the district court that Section 2259 requires a showing of proximate cause between the victim's losses and the defendant's conduct. Courts across the country have followed and applied the proximate-cause requirement in imposing restitution under Section 2259. *United States v. Crandon*, 173 F.3d 122, 126 (3d Cir.1999); *United States v. Searle*, 65 Fed.Appx. 343, 346 (2d Cir.2003); *United States v. Doe*, 488 F.3d 1154, 1160 (9th Cir.2007); *United States v. Estep*, 378 F.Supp.2d 763, 770-72 (E.D.Ky.2005); *United States v. Raplinger*, No. 05-CR-49-LRR, 2007 WL 3285802, *2, *6 (N.D.Iowa Oct. 9, 2007). Although this circuit has not yet construed the proximate cause requirement under Section 2259, it is neither clear nor indisputable that Amy's

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contentions regarding the statute are correct.[2]

The district court permitted extensive briefing and conducted two evidentiary hearings on the issue of restitution, giving Amy a full opportunity to be heard through her able representative. The court's Memorandum Opinion and Order reflects careful and thoughtful consideration of the law and the facts, as well as sensitivity to Amy and other victims of child pornography. Despite the government's contrary position to the court's ultimate factual finding on proximate causation, the district court did not " so clearly and indisputably abuse[ ] its discretion as to compel prompt intervention by the appellate court." *In re United States*, 397 F.3d 274, 282 (5th Cir.2005).

We, therefore, DENY the petition for writ of mandamus.

DENNIS, Circuit Judge, dissenting:

I respectfully di[illegible]t. Congress emphasized in 18 U.S.C. § 2259 that it is mandatory for a court to issue a restitution order in favor of a victim who was caused harm by child pornography. The district court's decision not to order restitution contravenes the text of § 2259 and congressional intent; it amounts to a clear and indisputable error that should be corrected by a writ of mandamus.

The standard of review in this case is stated in *In re Dean*, 527 F.3d 391 (5th Cir.2008). " A writ of mandamus may issue only if (1) the petitioner has ' no other adequate means' to attain the desired relief; (2) the petitioner has demonstrated a right to the issuance of a writ that is ' clear and indisputable; ' and (3) the issuing court, in the exercise of its discretion, is satisfied that the writ is ' appropriate under the circumstances.' " *Id.* at 394 (quoting *In Re United States*, 397 F.3d 274, 282 (5th Cir.2005)).

The first requirement is fulfilled for the reasons stated in the majority opinion. The third requirement is fulfilled because a mandamus petition is the means Congress has provided to enable crime victims to defend their rights in criminal proceedings, *see* 18 U.S.C. § 3771(d)(3), and because there are no prudential reasons for denying the petition under the current circumstances, as there were in *In re Dean*. And, for the reasons set forth below, the second requirement is fulfilled because it is clear and indisputable that the district court's decision contravened 18 U.S.C. § 2259.

Congress provided in § 2259(a) that the district court " shall order restitution for any offense under this chapter," including Paroline's offenses. " The order of restitution under this chapter shall direct the defendant to pay the victim ... the full amount of the victim's losses as determined by the court." *Id.* § 2259(b)(1). A " victim" is defined as " the individual harmed as a result of a commission of a crime under this chapter." *Id.* § 2259(c). " The full amount of the victim's losses," for purposes of the statute, " includes any costs incurred by the victim for-

(A) medical services relating to physical, psychiatric, or psychological care;

(B) physical and occupational therapy or rehabilitation;

(C) necessary transportation, temporary housing, and child care expenses;

(D) lost income;

(E) attorneys' fees, as well as other costs incurred; and

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(F) any other losses suffered by the victim as a proximate result of the offense."

Id. § 2259(b)(3). In enacting § 2259, " Congress

mandated broad restitution for a victim following an offender's conviction of federal child sexual exploitation and abuse offenses." *United States v. Crandon*, 173 F.3d 122 (3d Cir.1999). " Section 2259 is phrased in generous terms, in order to compensate the victims of sexual abuse for the care required to address the long term effects of their abuse." *United States v. Laney*, 189 F.3d 954, 966 (9th Cir.1999).

In the district court, the Government and petitioner presented evidence that she is a " victim" of Paroline's offense because she suffered an invasion of privacy and emotional and psychological harm as a result of Paroline's acquisition and possession of her sexually abusive childhood images. The district court found that she and the Government had satisfactorily proved these facts and that petitioner was therefore a " victim" for purposes of § 2259. This finding was consistent with the Supreme Court's view of the harm caused by child pornography. In *New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982), the Supreme Court held that the distribution of child pornography is not entitled to protection under the First Amendment. *Id.* at 764, 102 S.Ct. 3348. In so holding, the Supreme Court concluded that " [t]he use of children as subjects of pornographic materials is very harmful to both children and the society as a whole," and " the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation." *Id.* at 759, 102 S.Ct. 3348. We have extended the reasoning of *Ferber* to the possession of child pornography, concluding for sentencing purposes that " children depicted in child pornography may be considered victims of the crime of receiving child pornography." *United States v. Norris*, 159 F.3d 926, 929 (5th Cir.1998). [1] As we explained in *Norris*, those who possess child pornography harm the children depicted because doing so: (1) " perpetuates the abuse initiated by the producer of the materials" ; (2) " represents an invasion of the privacy of the child depicted" ; and (3) " instigates the original production of child pornography by providing an economic motive for creating and distributing the materials." *Id.* at 929-30.

The district court therefore found that " significant losses are attributable to the widespread dissemination and availability of [petitioner's] images and the possession of those images by many individuals *such as Paroline*. " Slip op. at 16 (emphasis added). The district court further found, " [t]here is no doubt that everyone involved with child pornography-from the abusers and producers to the end-users and possessors-contribute to [petitioner's] ongoing harm." *Id.* These findings necessarily require the conclusion that the Government and petitioner established that she has suffered losses proximately caused by Paroline's wrongful conduct.

But the district court nonetheless concluded that petitioner and the government had failed to prove that her losses were proximately caused by Paroline's crime because her losses were also contributed to by innumerable other persons who had acquired and possessed the same abusive child pornography of her. This was clear error. Petitioner, as the district court's findings establish, is entitled to restitution under § 2259: petitioner has suffered losses

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attributable, at least in part, to the defendant's possession of pornographic images. Based on these findings, the statute required the district court to calculate a dollar amount and impose restitution. Her right to restitution is not barred merely because the precise amount she is owed by Paroline is difficult to determine. Congress enacted § 2259 to provide broad restitution rights for victims who, like petitioner, have been harmed by the commission of child exploitation offenses, including possession of these sexually abusive images. Congress intended to afford child victims ample and generous protection and restitution, not to invite judge-made limitations patently at odds with the purpose of the legislation. Under the district court's analysis, the intent and purposes of § 2259 would be impermissibility nullified because the problem of allocating restitution present here will be found in virtually *every* case where a child depicted in electronically disseminated pornography seeks restitution from those who unlawfully possess those images.

Section 2259 does " not impose[ ] a requirement of causation approaching mathematical precision." *United States v. Doe*, 488 F.3d 1154, 1160 (9th Cir.2007). Thus, a district court does not abuse its discretion in ordering restitution under § 2259 so long as its award is a reasonable estimate and is not based on an " arbitrary calculation." *See United States v. Laney*, 189 F.3d 954, 967 n. 14 (9th Cir.1999). The Seventh Circuit has noted that the strong congressional intent underlying § 2259 may justify a relaxation of the usual bar against speculative future losses, depending on the type of loss claimed by the victim of child exploitation crimes. *See United States v. Danser*, 270 F.3d 451, 455-56 & n. 5 (7th Cir.2001). Accordingly, in light of the strong Congressional intent and purposes of § 2259, and its unequivocal language, an appellate court should affirm the district court's restitution award " under Section 2259 if the district court is able to estimate, based upon facts in the record, the amount of the victim's loss with some reasonable certainty." *Doe*, 488 F.3d at 1160.

It is also worth noting two statutory provisions that could have aided the district court in calculating restitution. Congress, recognizing the difficulty that victims such as petitioner face in showing the amount of their losses, has assigned a conclusive damages award in civil suits brought under the same Act creating the right to mandatory restitution for this offense. *See* 18 U.S.C. § 2255(a) (" Any person who, while a minor, was a victim of a violation of section ... 2252 ... and who suffers personal injury as a result of such violation may sue in any appropriate United States District Court and shall

recover the actual damages such p[illegible] sustains and the cost of the suit, including a reasonable attorney's fee. Any person as described in the preceding sentence shall be deemed to have sustained damages of no less than $150,000 in value."). In addition, § 2259(d)(2) provides:

Multiple crime victims-In a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings.

18 U.S.C. § 2259(d)(2). Although this subsection literally applies only to cases involving multiple crime victims, it also analogically expresses legislative intent as to how the district court should proceed to fashion a reasonable procedure to effectuate the chapter when the number of offenders involved in the violation of the

victim's rights makes it impracticable to accord her all of those rights.

For these reasons, I would vacate the district court's order denying the request for restitution and remand the case to the district court with instructions to reopen and reconsider the petitioner's request consistently with § 2259's broad and generous provisions mandating restitution for all victims harmed by child pornography.

Notes:

[1] *See* 2009 WL 4572786.

[2] The district court has wide discretion and flexibility in determining the victim's damages for purposes of entering its restitution order. Denial of relief under this mandamus standard, of course, does not prejudice Amy's right to seek relief in a civil action.

[1] Specifically at issue in *Norris* was whether the child depicted in a pornographic image may be considered a " victim" for purposes of applying the Sentencing Guidelines' offense grouping provisions. *See Norris*, 159 F.3d at 928-29.

Appendix E
District Court Opinion

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672 F.Supp.2d 781 (E.D.Tex. 2009)

UNITED STATES of America

v.

Doyle Randall PAROLINE.

No. 6:08-CR-61.

United States District Court, E.D. Texas, Tyler Division.

December 7, 2009

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Amicus, National Crime Victim Law Institute, Victim Rights Center.

Yiota G. Souras, The National Center for Missing and Exploited Children, Alexandria, VA, for Amicus, The National Center for Missing, and Exploited Children.

William D. Baldwin, U.S. Attorney's Office, Tyler, TX, for Plaintiff.

MEMORANDUM OPINION AND ORDER

LEONARD DAVIS, District Judge.

Before the Court is a Request for Restitution by Amy,[1] who is a victim in the " Misty" child pornography series.[2] Defendant Doyle Randall Paroline (" Paroline") unlawfully possessed two pornographic images of Amy he obtained over the Internet. Having considered the parties' oral arguments and written submissions, and for the reasons explained below, the Government has not met its burden of proving what losses, if any, were proximately caused by Paroline's possession of Amy's two pornographic images and thus, the Request for Restitution is **DENIED.**

BACKGROUND

On January 9, 2009, Paroline pled guilty to one count of possession of material involving the sexual exploitation of children in violation of 18 U.S.C. §§ 2252(a)(4)(B) and 2252(b)(2). Paroline admitted to knowingly possessing on his computers between 150 and 300 images of minors engaged in sexually explicit conduct (Docket No. 6). The National Center for Missing and Exploited Children (" NCMEC") identified Amy as at least one of the minors depicted in the pornographic images. Amy is depicted in two of the pornographic images Paroline possessed.[3]

On June 10, 2009, Paroline was sentenced to 24 months custody in the Bureau of Prisons and 120 months of supervised release. During sentencing, the Court reviewed Amy's Victim Impact Statement and her Request for Restitution under 18 U.S.C. § 2259.[4] Her Victim Impact Statement detailed not only the harm she has suffered from the abuse by her uncle when she was eight and nine years of age, but the harm she continues to endure ten years later by knowing that pornographic images of her are circulating against her will on the Internet and there is nothing she can do to stop it. In her Request for Restitution, Amy seeks approximately $3,367,854 from Paroline. This amount reflects the total amount of Amy's losses and includes costs for future psychological care, future lost income, and attorney's fees. Amy's Latest Request for Restitution, Docket No. 54-2, at 18. Amy offers no alternate theory of restitution for the portion of her total losses proximately caused by any single defendant's possession of her images. Amy's restitution request is being made by the Government on her behalf. Amy's personal attorney, Mr. James R. Marsh, has also participated in

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presenting Amy's restitution request in this case.

Because the issue of restitution in child pornography possession cases is one of first impression in this Court, the Court severed the restitution issue from the sentencing proceeding and ordered all interested parties to submit briefing on the issue (Docket No. 13). The Court received briefing from the Government, Amy, Paroline, and other interested parties including NCMEC. On August 20, 2009, the Court conducted a hearing pursuant to 18 U.S.C. § 3664(d)(5) to determine restitution. At the hearing, Paroline requested additional

time to obtain the data underlying Amy's restitution request and further brief the restitution issue. In addition, Paroline and his counsel waived the statutory requirement that a final determination concerning restitution be held within 90 days of sentencing (Docket No. 36). Following the August 20 hearing, Paroline filed a motion for certain discovery materials, which the Court granted in part and denied in part (Docket No. 46). [5] The Court received supplemental briefing from Paroline, the Government, and Amy, and held a second restitution hearing on October 28, 2009 where Paroline presented additional evidence and arguments against Amy's restitution request.

APPLICABLE LAW

The victim in this case seeks restitution under 18 U.S.C. § 2259, [6] which governs

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restitution for all offenses involving the sexual exploitation and other abuse of children. 18 U.S.C. § 2259(a). Section 2259 clearly mandates that the sentencing court order a defendant convicted of such an offense to pay restitution to the victim of the crime. 18 U.S.C. § 2259(b)(4)(A). The statute provides that restitution is available for " the full amount of the victim's losses." 18 U.S.C. § 2259(b)(1). Compensable losses under section 2259 include, among other things, any costs incurred by the victim for " medical services relating to physical, psychiatric, or psychological care," " physical and occupational therapy or rehabilitation," and " attorneys' fees, as well as other costs incurred." 18 U.S.C. § 2259(b)(3). Further, section 2259 specifically prohibits the Court from declining to order restitution because of the defendant's economic circumstances or because the victim receives compensation for his or her injuries from another source. 18 U.S.C. § 2259(b)(4)(B). The Government must prove the amount of the victim's losses by a " preponderance of the evidence," and that Court shall resolve any dispute as to the proper amount of restitution by the same standard. 18 U.S.C. § 3664(e).

ANALYSIS

Victim Status Under § 2259

The Court's first task is to determine whether Amy is a " victim" of Paroline's offense. Section 2259 defines a " victim" as any " individual harmed as a result of a commission of a crime under [the Sexual Exploitation and Other Abuse of Children Chapter of Title 18]." 18 U.S.C. § 2259(c). It is undisputed that Paroline was convicted of a crime under this chapter and that Amy was depicted in two of the pornographic images Paroline possessed. Thus, Amy is a victim for purposes of section 2259 if she was harmed as a result of Paroline's possession of her images.

Child pornography fosters the exploitation of innocent and vulnerable children all over the world. It causes irreparable harm to some of the weakest members of our society. Child pornography is a permanent photographic record of the victim's sexual abuse, and the distribution and circulation of the pornographic images forever exacerbates the harm to these child victims. *New York v. Ferber*, 458 U.S. 747, 759, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982) (finding that " [t]he distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children"). In the Supreme Court's landmark decision in *New York v. Ferber*, the Court extensively discussed the issue of child pornography and the long-term physiological, emotional, and mental harms associated with the sexual exploitation of children. 458 U.S. at 758, 102 S.Ct. 3348. The Court cited to various authorities in the field of child exploitation, noting that:

The use of children as ... subjects of pornographic materials is very harmful to both the children and the society as a whole. It has been found that sexually exploited children are unable to develop healthy affectionate relationships in later life, have sexual dysfunctions, and have a tendency to become sexual abusers as adults.

....

Pornography poses an even greater threat to the child victim than does sexual abuse or prostitution. Because the child's actions are reduced to a recording, the pornography may haunt him in

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future years, long after the original misdeed took place. A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography.

Id. at 758-60, nn. 9 & 10, 102 S.Ct. 3348 (internal quotations and citations omitted).

The Fifth Circuit has also addressed the issue of child pornography. In *United States. v. Norris*, the Fifth Circuit held that " children depicted in child pornography may be considered to be the victims of the crime of receiving child pornography." 159 F.3d 926, 929 (5th Cir.1998). The court determined that " the ' victimization' of the children involved does not end when the photographer's camera is put away." *Id.* The end-user or possessor of pornographic materials may be considered to be causing the children depicted in those materials to

suffer as a result of his actions in at least three ways: (1) because the dissemination of the images perpetuates the abuse initiated by the producer of the materials, a consumer who merely receives or possesses child pornography directly contributes to the child's continued victimization; (2) because the mere existence of the child pornography invades the privacy of the child depicted, the recipient of the child pornography directly victimizes the child by perpetuating the invasion of the child's privacy; and (3) because the consumer of child pornography instigates, enables, and supports the production of child pornography, the consumer continuously and directly abuses and victimizes the child subject. *Id.* at 929-30. Thus, " the victimization of a child depicted in pornographic materials flows just as directly from the crime of knowingly receiving child pornography as it does from the arguably more culpable offenses of producing or distributing child pornography." *Id.* at 930.

Congress has also long recognized the harm inflicted on victims of child pornography. In the legislative history of the Child Pornography Prevention Act of 1996, Congress specifically cited and broadly quoted from the landmark *New York v. Ferber* decision finding that " [t]he use of children as subjects of pornographic materials is harmful to the physiological, emotional and mental health of a child." S.Rep. No. 104-358, at 14 (1996) (citing *New York v. Ferber*, 458 U.S. 747, 759, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982)). Congress further observed that " it has been found that sexually exploited children are unable to develop healthy affectionate relationships in later life, have sexual dysfunctions, and have a tendency to become sexual abusers as adults." *Id.* More recently, Congress again addressed the impact of child pornography in the legislative history behind the Adam Walsh Child Protection and Safety Act of 2006, Pub.L. No. 109-248, § 501, 120 Stat. 587, 623 (2006). Congress found that " [t]he illegal production, transportation, distribution, receipt, advertising[,] and possession of child pornography ... is harmful to the physiological, emotional, and mental health of the children depicted in child pornography and has a substantial and detrimental effect on society as a whole." *Id.* Congress further observed that " [e]very instance of viewing images of child pornography represents a renewed violation of the privacy of the victims and repetition of their abuse." *Id.* at 624.

In addition to the courts' and Congress's recognition of the long-term harms associated with child pornography, NCMEC data indicates that incidents of online child pornography are increasing. *See* NCMEC's Brief, Docket No. 30. NCMEC was established in 1984 as a private, nonprofit organization to assist families, law enforcement, and other professionals in preventing the abduction, endangerment,

and sexual exploitation of children. *Id.* at 2. NCMEC works with both federal and state governments and law enforcement agencies to prevent and combat the growing problem of child sexual exploitation. *Id.* Using two central programs, the CyberTipline and the Child Victim Identification Program (" CVIP"), NCMEC serves as the central repository for information relating to child pornography cases across the country. *Id.* at 2-5. In 2000, NCMEC sponsored a study that profiled arrested offenders who possessed child pornography and surveyed participating state and local law enforcement agencies. *See* Janis Wolak, et al., *Child Pornography Possessors Arrested in Internet Related Crimes: Findings from the National Online Juvenile Victimization Study* (2005). The study revealed that the dissemination of child pornography may increase the trauma experienced by the victims because the victims know " their pictures are circulating globally on the Internet with no hope of permanent removal." *Id.* at 27.

In addition to NCMEC's study, various other studies document the harm caused to a child by the possession and distribution of child pornography. One study demonstrates that a child's psychological harm after the actual sexual exploitation continues into adulthood and affects his ability to develop healthy relationships. John E.B. Myers, et al., *The APSAC Handbook on Child Maltreatment* 55-69 (2d ed. 2002). The child victims develop a number of psychological disorders, including depression, withdrawal, and anger, and experience feelings of guilt, betrayal, powerlessness, worthlessness, and low self-esteem. *Id.* Another study suggests that the continual online distribution and possession of the child pornography images re-victimizes these child victims, stripping them of any control over the disclosure of their abuse and exposing them to further shame and humiliation. *See* Ethell Quayle, et al., *Child Pornography and Sexual Exploitation of Children Online* 59-60 (2008).

Based on the Supreme Court's analysis in *Ferber*, the Fifth Circuit's reasoning in *Norris*, and the overwhelming amount of literature and briefing regarding the harm caused to children depicted in child pornography, the Court finds that the Government has met its burden of establishing that Amy was " harmed as a result of" Paroline's possession of pornographic images depicting Amy's sexual abuse. Accordingly, Amy is a victim of Paroline's offense for purposes of section 2259. The Court now turns to the issue of causation between Paroline's conduct and his victim's alleged losses.

Causation Under § 2259

Amy contends that, as a matter of statutory construction, there is simply no proximate cause requirement for the losses specifically enumerated in the statute.[7] On the other hand, both the Government and Paroline are of the view that section 2259 requires a showing of proximate cause between the victim's losses and the defendant's conduct. The Government, however, argues that it has met its burden of proving by a preponderance of the evidence that the total amount of Amy's losses ($3,367,854) were indeed proximately caused by Paroline's conduct. Thus, the Court must determine first whether there is a proximate cause requirement in section 2259, and if so, whether the Government has met its burden of proving that

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the total amount of Amy's losses were proximately caused by Paroline's possession of Amy's two pornographic images.

Is There a Proximate Cause Requirement?

Section 2259 provides that restitution is available for " the full amount of the victim's losses." 18 U.S.C. § 2259(b)(1). The statute specifies that these losses include, among other things, any costs incurred by the victim for " medical services relating to physical, psychiatric, or psychological care," " physical and occupational therapy or rehabilitation," and " attorneys' fees, as well as other costs incurred." 18 U.S.C. § 2259(b)(3). The statute provides six categories of losses, but only the last subsection, which provides for " any other losses suffered by the victim" expressly contains a " proximate result" requirement. 18 U.S.C. § 2259(b)(3)(F).

Amy contends that proximate cause is simply not a factor in a restitution determination under section 2259. Specifically, Amy argues that, as a matter of statutory construction, the " proximate result" language in the statute modifies only the " catchall" category of losses, not the other loss categories enumerated in section 2259, and the other categories of loss are mandatory without regard to causation. However, the Supreme Court has held that " [w]hen several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." *Porto Rico Ry., Light & Power Co. v. Mor.*, 253 U.S. 345, 348, 40 S.Ct. 516, 64 L.Ed. 944 (1920); *see also Fed. Mar. Comm'n v. Seatrain Line, Inc.*, 411 U.S. 726, 734, 93 S.Ct. 1773, 36 L.Ed.2d 620 (1973) (holding that a " catchall provision" was " to be read as bringing within a statute categories similar in type to those specifically enumerated"). Based on this rule of construction, the phrase " as a proximate result of the offense" would apply equally to all the loss categories in section 2259(b)(3). This construction has been applied in a very well reasoned opinion of the District Court of Maine, holding that " the natural construction of [section 2259] demands that the proximate cause requirement be read as applicable to every class of loss set forth in the statute." *United States v. Berk*, 666 F.Supp.2d 182, 188 (D.Me.2009). [8]

Furthermore, construing the statute as Amy suggests could render section 2259 unconstitutional. Paroline argues that a restitution award not tied to those losses proximately caused by his conduct would " clearly be excessive" in violation of the Eighth Amendment.[9] Defendant's

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Opening Brief, Docket No. 26, at 15. " [A]n Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available." *Rust v. Sullivan*, 500 U.S. 173, 190, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991); *see also United States v. Valencia*, 394 F.3d 352, 355 (5th Cir.2004) (" In [construing a statute], we give effect to the intent of Congress, and as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act.") (internal citation omitted). This Court is of the opinion that a restitution order under section 2259 that is not limited to losses proximately caused by the defendant's conduct would under most facts, including these, violate the Eighth Amendment.

The Government agrees that section 2259 does have a causation requirement. " A victim is only entitled to recover restitution for losses that are proximately caused by the conduct in question" because " [i]t would be nonsensical for the statute to include differing burdens of proof and different causal requirements for different types of losses." Government's Opening Brief, Docket No. 29, at 3 & n. 13. However, the Government argues that it has met its burden of proving that Amy's total losses were proximately caused by Paroline's conduct. Paroline disagrees with both Amy and the Government.

Paroline contends that section 2259 requires that the Government prove by a preponderance of the evidence the amount of Amy's specific losses proximately caused by Paroline's possession of her two images. Paroline urges the Court to apply general restitution and causation principles in its analysis of section 2259. Defendant's Opening Brief, Docket No. 26, at 4-5. Indeed, restitution ordered in criminal cases is generally tied to the losses caused by the specific offense of conviction. *See Hughey v. United States*, 495 U.S. 411,

412-13, 110 S.Ct. 1979, 109 L.Ed.2d 408 (1990); *United States v. Maturin*, 488 F.3d 657, 660-61 (5th Cir.2007); *United States v. Wright*, 496 F.3d 371, 381 (5th Cir.2007).

For example, in *Hughey v. United States*, the Supreme Court held that the Victim and Witness Protection Act of 1982 (" VWPA") authorized restitution " only for the loss caused by the specific conduct that is the basis of the offense of conviction." 495 U.S. at 412-13, 110 S.Ct. 1979. The Fifth Circuit has applied *Hughey* noting that a " district court can award restitution to victims of the offense, but the restitution award can encompass only those losses that resulted directly from the offense for which the defendant was convicted." *Maturin*, 488 F.3d at 660-61, 661 n. 2 (noting that *Hughey*, 495 U.S. at 413, 110 S.Ct. 1979, also applies to cases arising under the Mandatory Victims Restitution Act of 1996 (" MVRA") and, although *Hughey* predated the enactment of the MVPA, the " [C]ourt's holding that restitution must be limited to losses caused by the offense of conviction remains good law"); *see also United States v. Arledge*, 553 F.3d 881, 898 (5th Cir.2008). Furthermore, " [w]hen a defendant is ordered to pay restitution in an amount greater than the loss caused, the error affects substantial rights as well as the fairness and integrity of the judicial proceeding." *United States v. Austin*, 479 F.3d 363, 373 (5th Cir.2007). The Fifth Circuit has referred to the causation requirement as the " *Hughey* limitation." *See United States v. Ortiz*, 252 Fed.Appx. 664, 666 (5th Cir.2007).

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However, the Fifth Circuit has also held that, although " [a] defendant sentenced under the [MVRA] is only responsible for paying restitution for the conduct underlying the offense for which he was convicted," " where a fraudulent scheme is an element of the conviction, the court may award restitution for actions pursuant to that scheme." *United States v. Inman*, 411 F.3d 591, 595 (5th Cir.2005) (internal citation omitted). Amy argues that " [t]he illicit trade in child pornography is a joint enterprise" and " [e]ach possession and each distribution of each image all combine to ... a ' single indivisible result.' " Amy's Latest Request for Restitution, Docket No. 54-2, at 14. *See United States. v. Norris*, 159 F.3d 926, 929-30 (5th Cir.1998). However, the offense of conviction in this case-possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B)and 2252(b)(2)-does not have a fraudulent scheme or conspiracy as an element of the offense. If the Court were to adopt Amy's reading of section 2259 and find that there is no proximate cause requirement in the statute, a restitution order could hold an individual liable for a greater amount of losses than those caused by his particular offense of conviction. This interpretation would be plainly inconsistent with how the principles of restitution and causation have historically been applied.

Although the Fifth Circuit has yet to construe section 2259, other circuits that have considered restitution awards under section 2259 have interpreted the statute to require a causal connection between the victim's losses and the offense of conviction. *United States v. Crandon*, 173 F.3d 122, 125 (3d Cir.1999) (" [Section 2259] requires awarding the full amount of the victim's losses suffered as a proximate result of the offense."); *United States v. Laney*, 189 F.3d 954, 965 (9th Cir.1999) (" Section 2259 ... incorporates a requirement of proximate causation ... requir[ing] a causal connection between the offense of conviction and the victim's harm."); *United States v. Searle*, 65 Fed.Appx. 343, 346 (2d Cir.2009) (assuming that section 2259 includes a requirement that the victim's losses be suffered by the victim as a proximate result of the offense). However, the Court is not aware of any circuit court that has considered a restitution award under section 2259 where the defendant was an end-user or possessor of child pornography. Restitution in possession cases is an issue of first impression in district courts around the nation as the Government has only recently begun seeking restitution from possessors of child pornography on behalf of victims.

Restitution orders entered in possession cases have varied among the various district courts addressing the issue. On July 9, 2009, a district court in the Northern District of Florida entered a restitution order against a possessor criminal defendant in favor of Amy in the amount of $3,263,758. *United States v. Freeman*, No. 3:08-cr-22 (N.D.Fla. filed July 9, 2009). Similarly, a district court in the Southern District of Florida ordered a possessor criminal defendant to pay $3,680,153 in restitution to Amy without addressing the proximate causation issue. *United States v. Staples*, No. 09-14017-CR, 2009 WL 2827204, at *3-4 (S.D.Fla. Sept. 2, 2009). On the other hand, a district court in the Northern District of California declined to order restitution because restitution was precluded under the defendant's plea agreement, but noted that " a restitution order in [an end-user possession] case must be based upon the identification of a specific injury to the victim that was caused by the specific conduct of the defendant." *United States v. Simon*, 2009 WL 2424673, at *7 (N.D.Cal. August 7, 2009). The Central and Eastern Districts of California have taken a different approach,

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seemingly adopting a set amount of restitution per defendant convicted of possession of child pornography.

See United States v. Brown, No. 2:08-cr-1435 (C.D.Cal. filed Oct. 5, 2009) (awarding restitution in the amount of $5,000 to each victim); *United States v. Ferenci*, No. 1:08-cr-0414, 2009 WL 2579102, at *6 (E.D.Cal. Aug. 19, 2009) (awarding restitution in the amount of $3,000 to the victim). In another case, the Government and the defendant stipulated to the amount of restitution because it was " in the best interest of justice, judicial expedience[,] and economy in resolving this novel legal issue." *United States v. Granato*, No. 2:08-cr-198 (D. Nev. filed August 28, 2009). Most recently, a district court in Maine declined to order restitution finding that the Government " failed to present sufficient evidence showing a particular loss proximately caused by the offense of conviction." *United States v. Berk*, 666 F.Supp.2d 182, 193 (D.Me.2009).

After considering all of the arguments, authority before it, and principles of statutory construction, the Court finds that section 2259 requires that a victim's losses be proximately caused by the defendant's conduct to be recoverable in restitution. General restitution and causation principles applied by the Supreme Court and the Fifth Circuit support this interpretation of the statute. Moreover, this interpretation is consistent with the various circuit courts that have interpreted section 2259 to require that the victim's losses be proximately caused by the defendant's conduct. Thus, an award of restitution under section 2259 is appropriate only for the amount of the victim's losses proximately caused by the defendant's conduct.

Were Amy's Total Losses Proximately Caused By Paroline's Possession? [10]

The Government argues that the proximate cause requirement is satisfied because Amy was obviously " harmed" by Paroline's conduct. However, the Government is conflating the proximate cause requirement with the requirement that the victim be harmed as a result of Paroline's conduct. Certainly, Amy was harmed by Paroline's possession of Amy's two pornographic images, but this does little to show how much of her harm, or what amount of her losses, was proximately caused by Paroline's offense. A victim is not necessarily entitled to restitution for all of her losses simply because the victim was harmed and sustained some lesser loss as a result of a defendant's specific conduct. The proper inquiry is whether the Government has met its burden of proving by a preponderance of the evidence the amount of Amy's losses proximately caused by Paroline's conduct.

Proximate cause is defined as " [a] cause that directly produces an event and without which the event would not have occurred." BLACK'S LAW DICTIONARY 234 (8th ed. 2004). Thus, the Government has the burden of proving the amount of Amy's losses directly produced by Paroline that would not have occurred without his possession of her images. The Court is guided by certain principals in making this determination. " The determination of an appropriate restitution amount is by nature

an inexact science," *United States v. Teehee*, 893 F.2d 271, 274 (10th Cir.1990), and " [a] sentencing court may resolve restitution uncertainties ' with a view towards achieving fairness to the victim,' so long as it still makes a ' reasonable determination of appropriate restitution' rooted in a calculation of actual loss." *United States v. Fallah*, No. H-07-155, 2008 WL 5102281, at *2 (S.D.Tex. December 1, 2008) (quoting *United States v. Yaknin*, 112 F.3d 579, 587 (1st Cir.1997) (internal quotation omitted)). Notwithstanding some latitude in making this determination, the Court must be guided by the premise that " [a]n order of restitution must be limited to losses caused by the specific conduct underlying the offense of conviction." *United States v. Tencer*, 107 F.3d 1120, 1135 (5th Cir.1997).

The Court has held two hearings regarding the issue of restitution in this case and has reviewed the parties' initial and supplemental briefs. To substantiate her claim for approximately $3,367,854 in restitution, Amy has submitted: (1) a Victim Impact Statement; (2) a psychological evaluation by Dr. Joyanna Silberg dated November 21, 2008; (3) an economic report by Dr. Stan V. Smith dated September 15, 2008; and (4) numerous excerpts from articles discussing the harms associated with child pornography. The losses described in Amy's reports are generalized and caused by her initial abuse as well as the general existence and dissemination of her pornographic images. No effort has been made to show the portion of these losses specifically caused by Paroline's possession of Amy's two images. After reviewing the data underlying Amy's experts' reports, Paroline submitted a supplemental brief that identifies certain discrepancies between Amy's Victim Impact Statement and Dr. Silberg's notes. Paroline's supplemental briefing also includes a report by Dr. Timothy J. Proctor enumerating his concerns as to the reliability of Dr. Silberg's report and an economic report prepared by Dr. Kent Gilbreath that sets forth estimates of Amy's future potential earning capacity to illustrate the discrepancy between his sums and those of Dr. Smith.[11]

It is clear from the evidence before the Court that a large portion of Amy's total losses were caused by her original abuse by her uncle. It is equally clear that

significant losses are attributed to the widespread dissemination and availability of her images and the possession of those images by many individuals such as Paroline. There is no doubt that everyone involved with child pornography-from the abusers and producers to the end-users and possessors-contribute to Amy's ongoing harm. The Court is sympathetic to Amy and the harm that she has undoubtedly experienced and will continue to experience for the rest of her life. The Court also realizes that it is incredibly difficult to establish the amount of a victim's losses proximately caused by any one defendant convicted of possession. However, the Court's sympathy does not dispense with the requirement that the Government satisfy its burden of proving the amount of Amy's losses proximately caused by Paroline's

possession of her two images. Although this may seem like an impossible burden for the Government, the Court is nevertheless bound by the requirements of the statute.[12]

Having reviewed all of the evidence, the Court finds that the Government has failed to meet its burden of proving any specific losses proximately caused by Paroline's conduct. Thus, an award of restitution is not appropriate in this case. *See Berk*, 2009 WL 3451085, at *5. *But cf. United States v. Baker*, 666 F.Supp.2d 182 (E.D.Tex.2009) (awarding $150,000 in restitution to each minor victim).[13]

CONCLUSION

Accordingly, the Court finds that Amy was harmed as a result of Paroline's conduct and thus, is a " victim" for purposes of section 2259. However, a restitution award under section 2259 requires that the Government prove by a preponderance of the evidence the amount of the victim's losses proximately caused by the defendant's conduct. Having considered the parties' oral arguments and written submissions, the Government has not met its burden of proving what losses, if any, were proximately caused by Paroline's possession of Amy's two pornographic images and thus, the Request for Restitution is **DENIED.**

Notes:

[1] " Amy" is a pseudonym used to protect the privacy of the victim in the " Misty" child pornography series.

[2] A series is a collection of images and/or video files taken over a period of time, typically containing both pornographic and non-pornographic images of a child or children. NCMEC's Brief, Docket No. 30, at 5.

[3] Amy was sexually exploited by her uncle when she was eight and nine years of age. She is now 19 years of age. The pornographic images of her abuse depict rape, cunnilingus, fellatio, and digital penetration. These images have been, and continue to be, traded and distributed on the Internet. Amy's Latest Request for Restitution, Docket No. 54-2, at 3.

[4] This is only one of approximately 250 restitution requests Amy has filed against different defendants across the country who have been charged with possession of child pornography involving the " Misty" series.

[5] In his discovery motion, Paroline requested the data underlying Amy's experts' reports and requested that he be allowed to depose Amy's experts. The Court granted these requests. The Court also granted Paroline's request for an accounting of all cases in which Amy had filed a similar restitution request and the amount of restitution ordered and collected in each case. Paroline further requested that Amy be produced for a forensic psychological or psychiatric examination. The Court denied this request. Paroline also requested expert funds to assist him in rebutting the data underlying Amy's Request for Restitution. The Court denied this request without prejudice to re-urging at a later date.

[6] Section 2259 provides:

(a) In general.-Notwithstanding section 3663 or 3663A, and in addition to any other civil or criminal penalty authorized by law, the court shall order restitution for any offense under this chapter.

(b) Scope and nature of order.-

(1) Directions.-The order of restitution under this section shall direct the defendant to pay the victim (through the appropriate court mechanism) the full amount of the victim's losses as determined by the court pursuant to paragraph (2).

(2) Enforcement.-An order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A.

(3) Definition.-For purposes of this subsection, the term " full amount of the victim's losses" includes any costs incurred by the victim for-

(A) medical services relating to physical, psychiatric, or psychological care;

(B) physical and occupational therapy or rehabilitation;

(C) necessary transportation, temporary housing, and child care expenses;

(D) lost income;

(E) attorneys' fees, as well as other costs incurred; and

(F) any other losses suffered by the victim as a proximate result of the offense.

(4) Order mandatory.-

(A) The issuance of a restitution order under this section is mandatory.

(B) A court may not decline to issue an order under this section because of-

(i) the economic circumstances of the defendant; or

(ii) the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source.

(c) Definition.-For purposes of this section, the term " victim" means the individual harmed as a result of a commission of a crime under this chapter, including, in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, but in no event shall the defendant be named as such representative or guardian.

[7] Thus, Amy seeks restitution for the full amount ($3,367,854) of her losses stemming from the abuse itself and the dissemination of her pornographic images. Amy's theory of restitution is not limited to those losses proximately caused by any single defendant's possession of her images. She embraces the view that every defendant is jointly and severally liable for the total amount of her losses, although she points out that she is not seeking any windfall beyond her total losses, i.e. no double recovery.

[8] In further support of her argument against reading a proximate cause requirement into the statute, Amy argues that other federal restitution statutes require either " proximate harm" or " direct harm" in the definition of " victim" while section 2259 requires a more generalized " harm." Amy's Latest Request for Restitution, Docket No. 54-2, at 25. Amy suggests that by omitting the terms " directly" or " proximately" in section 2259's definition of " victim," " Congress ... explicitly recognized the causal link between the criminal conduct ... and the harm experienced by the victims." *Id.* However, this argument is unpersuasive because the Court has already concluded that Amy has been harmed by Paroline's conduct. The relevant inquiry at this stage of the analysis is not whether Amy has been harmed by Paroline's conduct, but whether the statute requires that the Government prove the amount of Amy's losses proximately caused by Paroline's conduct.

[9] The Eighth Amendment provides: " Excessive bail shall not be required, no excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST., amend. VIII. Paroline cites to *United States v. Bajakajian*, where the Supreme Court held a criminal forfeiture invalid under the Eighth Amendment reasoning " [i]f the amount of the forfeiture is grossly disproportional to the gravity of the defendant's offense, it is unconstitutional." 524 U.S. 321, 337, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998). The Third and Ninth Circuits have reviewed restitution issues under the same Eight Amendment analysis. *See United States v. Dubose*, 146 F.3d 1141, 1144-45 (9th Cir.1998); *United States v. Lessner*, 498 F.3d 185, 205 (3d Cir.2007).

[10] This type of " possession case" differs from a " production case," where the defendant is the actual abuser and producer of the child pornography. In a " production case" there is no question of causation because all of the victim's losses are proximately caused by the defendant. *See United States v. Baker*, 666 F.Supp.2d 182 (E.D.Tex.2009) (" [R]estitution in [a ' production case'] is payment for the harm caused to the victim by the production and dissemination of the child pornography.... The entirety of losses these images cause these children, now and in the future, is a direct and proximate result of the crimes to which [the defendant] pled guilty.")

[11] In addition, the Government, Amy, and Paroline entered into a Stipulation establishing that Amy does not know who Paroline is and none of the losses for which she seeks restitution flow from her knowledge about Paroline or his conduct (Docket No. 47). Paroline argues that this " effectively precludes a finding by the Court that any of Amy's injuries or damages were the proximate result of [his] conduct." Defendant's Supplemental Brief, Docket No. 48, at 15. However, section 2259 does not require that Amy have knowledge of each individual possessor and his conduct in order to establish proximate cause, it simply requires that restitution be tied to the victim's losses proximately caused by a defendant's possession of Amy's images.

[12] While Congress was obviously well intended in attempting to create a statutory framework to help compensate victims of child pornography, it has

unfortunately created one that is largely unworkable in the context of criminal restitution. 18 U.S.C. § 2255, however, does provide a civil remedy for those victims able to obtain counsel to pursue it. There is a great need for counseling and medical care for victims of child pornography. Perhaps a statutory provision requiring that fines for child pornography be paid to a national center that would act as a trustee to disburse funds for counseling of victims of child pornography would do more to help these victims than the seemingly unworkable criminal restitution provisions in 18 U.S.C. § 2259.

[13] In *Baker*, the Court relied on Congress's mandated minimum damage amount of $150,000 set forth in 18 U.S.C. § 2255(a) to award the minor victims $150,000 each in restitution. The Court found the victims' expert's estimate of losses inadequate to cover the full amount of the victims' losses, reasoning that any award of restitution below the statutorily mandated minimum of $150,000 would fall short of making the minor victims whole. This case differs from *Baker* in two respects. First, the defendant in *Baker* was the actual producer and distributor of the child pornography and thus, causation was not an issue. Therefore, the Court's only task in *Baker* was to determine the proper amount of restitution. In contrast, as a case of first impression, this " possession case" required an exhaustive causation analysis to determine whether an award of restitution was even appropriate. Because the Court has concluded that the Government did not establish any specific losses proximately caused by Paroline's possession of Amy's images, the amount of restitution in this case was not subject to calculation. Second, unlike *Baker*, where the Court was confident $150,000 was far below the minor victims' actual losses, the Court is concerned that a restitution award of $150,000 in this case may exceed any specific losses proximately caused by Paroline's possession of Amy's images. *See United States v. Austin*, 479 F.3d 363, 373 (5th Cir.2007) (holding that when a restitution award is greater than the losses caused by the defendant's conduct, the error affects the defendant's substantial rights and the fairness and integrity of the judicial proceeding).

OPPOSITION BRIEF

ORIGINAL

Supreme Court, U.S.
FILED
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Nos. 12-8505 and 12-8561

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL WRIGHT, PETITIONER

v.

UNITED STATES OF AMERICA

DOYLE RANDALL PAROLINE, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 2259, which provides for mandatory restitution for victims of child-exploitation offenses, requires a showing that the defendant's offense conduct proximately caused the victim's losses.

2. Whether the government can satisfy the requisite causation standard under 18 U.S.C. 2259 for child-pornography possession offenses. (No. 12-8505 only.)

3. Whether a defendant who is convicted of possessing images of child pornography can be held jointly and severally liable with other similarly situated defendants for the full amount of the victim's losses. (No. 12-8505 only.)

4. Whether a restitution award issued in accordance with the court of appeals' decision violates the Eighth Amendment's Excessive Fines Clause. (No. 12-8561 only.)

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OPINIONS BELOW

The amended opinion of the en banc court of appeals (Pet. App. A) is reported at 701 F.3d 749.[1] The original opinion of the en

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[1] Unless otherwise noted, all references to "Pet. App." are to the appendix to the petition in No. 12-8561.

banc court of appeals (Pet. App. B) is reported at 697 F.3d 306. The panel opinion in No. 12-8505 is reported at 639 F.3d 679. The panel opinions in No. 12-8561 (Pet. App. C, D) are reported at 636 F.3d 190 and 591 F.3d 792. The district court opinion in No. 12-8561 (Pet. App. E) is reported at 672 F. Supp. 2d 781.

JURISDICTION

The amended judgment of the en banc court of appeals was entered on November 19, 2012. The petitions for a writ of certiorari were filed on January 31, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following guilty pleas in separate and unrelated proceedings, petitioners were both convicted of possession of child pornography, in violation of 18 U.S.C. 2252(a)(4)(B). The government sought restitution under 18 U.S.C. 2259 on behalf of a victim ("Amy") who was depicted in some of the images possessed by petitioners. The District Court for the Eastern District of Texas declined to order petitioner Paroline to pay any restitution. The District Court for the Eastern District of Louisiana ordered petitioner Wright to pay $529,661 in restitution. See Pet. App. A4-A6.

In Paroline's case, Amy filed a petition for a writ of mandamus under the Crime Victims' Rights Act (CVRA), Pub. L. No. 108-405, Title I, § 102(a), 118 Stat. 2262 (18 U.S.C. 3771(d)(3)), and a notice of appeal. The court of appeals

initially denied the mandamus petition, but on rehearing the court issued a writ of mandamus and ordered the district court to award restitution. Wright, meanwhile, filed a direct appeal. The court of appeals vacated and remanded for further findings on the amount of restitution ordered. See Pet. App. A4-A7.

Petitioners independently filed petitions for rehearing en banc. The court of appeals granted the petitions and consolidated the cases for argument and decision. The en banc court granted Amy's mandamus petition in Paroline's case and remanded for further proceedings. The en banc court initially vacated the judgment in Wright's case and remanded for reconsideration of the amount of restitution, but it later amended the opinion to affirm the district court's judgment. See Pet. App. A, B.

1. When sentencing a defendant "for any offense" under Chapter 110 of Title 18, which covers sexual offenses involving children, a court is to order restitution in "the full amount of the victim's losses." 18 U.S.C. 2259(a) and (b)(1). The possession of child pornography is a Chapter 110 offense. See 18 U.S.C. 2252(a)(4)(B). A "victim," in turn, is defined as an "individual harmed as a result of a commission of a crime under this chapter." 18 U.S.C. 2259(c). And the "full amount of the victim's losses" is defined to include medical services (including psychiatric and psychological care); physical and occupational therapy or rehabilitation; necessary transportation, temporary

housing, and child care expenses; lost income; attorney's fees and other litigation costs; and "any other losses suffered by the victim as a proximate result of the offense." 18 U.S.C. 2259(b)(3).

Section 2259 further provides that the order of restitution "shall be issued and enforced in accordance with [18 U.S.C.] 3664." 18 U.S.C. 2259(b)(2). Section 3664(e) places on the government the "burden of demonstrating the amount of the loss sustained by a victim as a result of the offense" and provides that "[a]ny dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence." 18 U.S.C. 3664(e). Section 3664(h) provides that "[i]f the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant." 18 U.S.C. 3664(h).

Although a crime victim is not a party to the criminal prosecution, the CVRA provides that the victim, or the government on the victim's behalf, may seek to enforce the victim's rights by filing a motion in the district court. See 18 U.S.C. 3771(d)(1) and (3). One such right is "[t]he right to full and timely restitution as provided in law." 18 U.S.C. 3771(a)(6). If the district court "denies the relief sought, the movant" (i.e., the

victim or the government) "may petition the court of appeals for a writ of mandamus." 18 U.S.C. 3771(d)(3). The government may also "assert as error the district court's denial of any crime victim's right" through an "appeal" in the underlying criminal case. 18 U.S.C. 3771(d)(4).

2. a. On July 11, 2008, FBI agents in Tyler, Texas, met with petitioner Paroline after an employee of a computer company discovered that Paroline's laptop contained numerous images of children posing nude and engaging in various sexual acts with adults and animals. Paroline admitted that he had downloaded those images from the Internet and that he had downloaded and viewed child pornography for the last two years. A forensic analysis of Paroline's laptop uncovered 280 such images. Paroline Presentence Investigation Report (PSR) ¶¶ 9-12.

The government filed an information in the Eastern District of Texas charging Paroline with possession of images of child pornography, in violation of 18 U.S.C. 2252(a)(4)(B). Paroline pleaded guilty, pursuant to a plea agreement, and the district court sentenced him to 24 months of imprisonment, to be followed by ten years of supervised release. See Pet. App. E1.

b. Following Paroline's guilty plea, the government received a request for restitution from one of the identified victims depicted in the child-pornography images possessed by Paroline. That victim, identified by the pseudonym "Amy" to protect her

privacy, submitted materials supporting her request for restitution in the amount of roughly $3.4 million, which included the cost of future psychological counseling, future lost income, and attorney's fees.[2] The materials included a victim-impact statement, a psychological evaluation, and an economic analysis. The government submitted her request to the district court. See Pet. App. E1, E6.

After extensive briefing and hearings, the district court declined to order any restitution. See Pet. App. E. The court agreed that Amy qualified as a "victim" under Section 2259 because she had been "harmed as a result of Paroline's possession of her images." Id. at E2-E3. The court concluded, however, that the government needed to demonstrate proximate cause and that it failed to make that necessary showing. Id. at E4-E7. In the court's view, the evidence submitted failed to establish "any specific

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[2] Petitioners suggest (e.g., 12-8561 Pet. 4, 12, 14, 15) that Amy's claimed losses include those suffered solely as a result of her initial abuse. That is incorrect. According to Amy's expert forensic psychologist, she had completed therapy for the initial abuse and was "back to normal" until she learned years later that images depicting her sexual abuse were circulating on the Internet. United States v. Lundquist, 847 F. Supp. 2d 364, 374 n.13 (N.D.N.Y. 2011) (citation omitted). That knowledge caused Amy to regress and suffer a "resurgence of the trauma." Ibid. (citation omitted). The claimed losses include only future therapy costs and lost wages, beginning no earlier than 2009, and are based on the invasion of privacy caused by individuals (like petitioners) who receive, possess, transport, or distribute images of Amy's sexual abuse.

losses proximately caused by Paroline's conduct," as distinguished from the conduct of others who had also harmed Amy. Id. at E7.

c. Amy filed both a notice of appeal and a petition for a writ of mandamus under Section 3771(d)(3) of the CVRA. See Pet. App. C1. A divided panel of the court of appeals denied her mandamus petition. Id. at D1-D4. Applying prior precedent, the court reaffirmed that "[t]he standard of review [of a CVRA mandamus petition] is the usual standard for mandamus petitions," which meant that Amy, as the petitioner, had to show that the district court committed "clear and indisputable" error in adopting a proximate-cause requirement. Id. at D1. Because "[c]ourts across the country have followed and applied the proximate-cause requirement in imposing restitution under Section 2259," the court concluded that "it is neither clear nor indisputable that Amy's contentions regarding the statute are correct." Id. at D2. Judge Dennis dissented. Id. at D2-D4.

Amy filed a petition for panel rehearing. A different panel was assigned the rehearing petition as well as Amy's pending appeal. Pet. App. C1. That panel granted Amy's petition for rehearing and held that the district court had in fact committed "clear and indisputable error" by "[i]ncorporating a proximate causation requirement [into Section 2259] where none exists." Id. at C6. Rather, the court explained, the only showing of causation necessary for the enumerated categories of losses is the "general

causation" required for a claimant to qualify as a "victim" under Section 2259(c), i.e., a showing that the claimant suffered harm "as a result of" the offense. Id. at C5. Applying that standard, the court concluded that Amy was a "victim" entitled to restitution. Ibid. Accordingly, it issued a writ of mandamus and remanded the case to the district court with instructions to calculate an appropriate restitution award. Id. at C6.[3]

3. a. In October 2005, federal agents initiated an investigation into "Illegal.CP," a hard-core child pornography website. Through the investigation, agents obtained information that a credit card belonging to petitioner Wright was being used to obtain access to a website that provided images of child pornography. On March 26, 2009, agents went to Wright's residence to execute a search warrant. Wright admitted that he had purchased two subscriptions to online child-pornography websites, including Illegal.CP, and that he used his computer to search for, download, and save images of child pornography. A subsequent forensic examination of Wright's computer and related digital media disclosed roughly 30,000 images and videos depicting the sexual victimization of children. Agents also recovered e-mail receipts confirming that Wright subscribed to child-pornography websites,

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[3] The court of appeals declined to reach the issue of whether a crime victim has a right to a direct appeal. Pet. App. C1.

including "Illegal.CP." See Wright C.A. R.E. 49-50; Wright PSR ¶¶ 9-12, 16.

The government filed an information in the Eastern District of Louisiana charging Wright with possession of images of child pornography, in violation of 18 U.S.C. 2252(a)(4)(B). Wright pleaded guilty pursuant to a plea agreement. The plea agreement specified that "the restitution provisions of Sections 3663 and 3663A of Title 18, United States Code will apply," but it did not mention Section 2259. Wright C.A. R.E. 52. Wright "expressly waive[d] the right to appeal his sentence on any ground," but "reserve[d] the right to appeal any punishment imposed in excess of the statutory maximum." Ibid. The district court sentenced him to 96 months of imprisonment, to be followed by a lifetime term of supervised release. Id. at 88-90.

b. The government subsequently received a request for restitution from "Amy," one of the identified victims depicted in the child-pornography images possessed by Wright. Amy submitted materials supporting her request for restitution in the amount of roughly $3.4 million. Attached to the request were copies of the same materials Amy had submitted in petitioner Paroline's case (i.e., her victim-impact statement, a psychological report, and an economic analysis). The government submitted her request to the district court. See 639 F.3d 679, 681-682.

The district court awarded restitution in the amount of $529,661 which, the court explained, reflected the sum of "the estimated cost of the victim's future treatment and counseling at $512,681, and the cost of the victim's expert witness fees at $16,980." Wright C.A. R.E. 111. The court further noted that "[t]he restitution ordered herein is concurrent with any other restitution order either already imposed or to be imposed in the future payable to this victim." Id. at 111-112.

c. The court of appeals vacated and remanded. As an initial matter, the court rejected the government's argument that Wright's appeal was barred by his appeal waiver. 639 F.3d at 683-684. On the merits, the court recognized that it was bound by the recent decision in Paroline's case. Id. at 684. The court therefore held that the government did not have to prove that Amy's losses were the proximate result of Wright's offense conduct and that Amy was entitled to restitution because she was a "victim" of that offense. Id. at 684-685. The court nevertheless vacated the restitution order because the district court failed "to give a reasoned analysis of how it arrived at its award in a manner that allows for effective appellate review." Id. at 686.

All three panel judges specially concurred to express their "disagreement with the recent holding [in Paroline's case] that [Section] 2259 does not limit the victim's recoverable losses to those proximately caused by the defendant's offense and to urge the

court to grant en banc review of that decision." 639 F.3d at 686-692.

d. On June 7, 2011, Amy filed a letter in the district court withdrawing her restitution request with prejudice. See Amy Cert. Resp. App. 1-2. On June 16, 2011, the district court held a status conference about Amy's request, but it did not take any action at that time. See Dist. Ct. Dkt. 58 (Minute Entry). On April 25, 2013, Wright filed a motion to amend the June 16, 2011, minute entry to reflect the details of that status conference, which the court denied. See id. 62 (Motion), 64 (Order).

4. Both petitioners sought rehearing en banc. The court of appeals granted both petitions and consolidated the cases for argument and decision. After supplemental briefing and argument, the en banc court vacated the judgment in petitioner Paroline's case and remanded for further proceedings. In an amended opinion, the en banc court ultimately affirmed the judgment in petitioner Wright's case. See Pet. App. A, B.

a. As relevant here, the en banc court of appeals held that Section 2259 does not require a showing of proximate cause with respect to the enumerated categories of losses. Pet. App. A20-A21. Relying primarily on the "rule of the last antecedent," the court concluded that a proximate-cause requirement exists only for the catch-all category of "other losses suffered by the victim." Id. at A20-A21, A22-A26 (quoting 18 U.S.C. 2259(b)(3)(F)). The court

acknowledged that several circuits had held otherwise, but it found those decisions unpersuasive. Id. at A26-A31.

The en banc court next addressed "how to allocate responsibility for a victim's harm to any single defendant," given that numerous defendants have possessed Amy's images. Pet. App. A31. In answering that question, the court noted that the statute mandates an award for the "full amount of [the victim's] losses." Ibid. (citation omitted). The court explained that 18 U.S.C. 3664(h) permits a court to hold a defendant jointly and severally liable with other defendants, even defendants in different cases Pet. App. A32-A33. Finally, the court dismissed concerns about overcompensation and the Eighth Amendment, noting (among other things) that a victim's total recovery would be capped at her losses and that district courts could "ameliorate the impact of joint and several liability on an individual defendant" through the use of a "payment schedule" corresponding to the defendant's ability to pay. Id. at A34-A38.

Applying those principles, the en banc court held that the district court's refusal to award any restitution in Paroline's case was "clear and indisputable" error. Pet. App. A40-A41.[4] The court explained that "[b]ecause Amy is a victim, [Section] 2259

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[4] The en banc court held that crime victims do not have a right of appeal under the CVRA and, accordingly, only mandamus review is available. Pet. App. A10.

required the district court to award her restitution for the 'full amount of [her] losses' as defined under [Section] 2259(b)(3)." Id. at A40. Accordingly, the court granted Amy's mandamus petition and remanded to the district court for a determination of the "full amount of [Amy's] losses." Id. at A41 (brackets in original).

In Wright's case, the en banc court declined to enforce the appeal waiver. Pet. App. A5 n.4. The court initially vacated the district court's judgment and remanded for an explanation of the court's failure to order the full amount of restitution requested by Amy. See id. at B13. In an amended opinion, however, the court ultimately affirmed the district court's judgment in light of Greenlaw v. United States, 554 U.S. 237 (2008). See Pet. App. A41.

b. Judge Dennis concurred in part in the judgment, suggesting that the majority should have "le[ft] the decision as to how to proceed under these statutes to the district courts" in the first instance. Pet. App. A43-A44. Judge Davis, joined by three other judges, concurred in part and dissented in part, concluding that proximate cause is required for all categories of losses, but that the required showing should focus on the aggregate harms caused by possessors of child pornography generally. Id. at A45-A54. Judge Southwick filed a separate dissent. Id. at A55-A58.

ARGUMENT

Petitioners both seek review (12-8505 Pet. 10-12; 12-8561 Pet. 11-13) on the threshold question whether Section 2259 requires a

showing that the defendant's offense conduct was a proximate cause of the victim's losses. Petitioner Wright also seeks review of two related issues (12-8505 Pet. 13-28): whether the requisite causation standard can be satisfied in a case where the underlying offense is possession of child pornography, and whether a defendant in such a case can be ordered jointly and severally liable for the full amount of a victim's losses. Petitioner Paroline proposes one additional question (12-8561 Pet. 14-15): whether a restitution award issued in accordance with the court of appeals' decision would violate the Eighth Amendment. None of the questions presented warrant the Court's review at this time. The purported conflicts among the courts of appeals are overstated and percolation has proven critical to the development of this area of the law. Because neither case presents a suitable vehicle for the Court to consider these issues in any event, such percolation should be permitted to continue.[5]

1. Petitioners both contend (12-8505 Pet. 10-12; 12-8561 Pet. 11-13) that the court of appeals erred in holding that 18 U.S.C. 2259 does not require a showing that the defendant's

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[5] The question presented in Amy and Vicky, Child Pornography Victims v. United States District Court for the Western District of Washington, No. 12-651 (filed Nov. 20, 2012), is similar to those presented in Paroline's and Wright's petitions and the government is accordingly filing its brief in opposition in that case at the same time. For the reasons discussed, that case is also an unsuitable vehicle to consider the question presented.

offense conduct proximately caused the victim's losses, except for the catch-all category of "other losses." Although the government agrees with petitioners that a showing of proximate cause is required for all categories of losses, the Court's review is nevertheless unwarranted.

a. Section 2259 mandates an award of restitution to a victim, like Amy, who was harmed "as a result of" a defendant's possession of images depicting her sexual abuse. See 18 U.S.C. 2259(a), (b)(4) and (c). A restitution order must cover "the full amount of the victim's losses." 18 U.S.C. 2259(b)(1). The statute defines that phrase to include five enumerated categories of losses (e.g., medical services; physical therapy; necessary transportation, temporary housing, or child care; lost income; and attorney's fees), as well as "any other losses suffered by the victim as a proximate result of the offense." 18 U.S.C. 2259(b)(3)(A)-(F). The question is whether the government must also prove that the defendant's offense conduct proximately caused the enumerated categories of losses.

Every other court of appeals has answered that threshold question in the affirmative, holding that a showing of proximate cause is required. See United States v. Kearney, 672 F.3d 81, 95-96 (1st Cir. 2012), cert. dismissed, 133 S. Ct. 1521 (2013); United States v. Aumais, 656 F.3d 147, 152-154 (2d Cir. 2011); United States v. Burgess, 684 F.3d 445, 455-458 (4th Cir.), cert. denied,

133 S. Ct. 490 (2012); United States v. Gamble, 709 F.3d 541, 546-547 (6th Cir. 2013); United States v. Laraneta, 700 F.3d 983, 989-990 (7th Cir. 2012); United States v. Fast, 709 F.3d 712, 720-722 (8th Cir. 2013); United States v. Kennedy, 643 F.3d 1251, 1260-1261 (9th Cir. 2011); United States v. Benoit, No. 12-5013, 2013 WL 1298154, at *12-*16 (10th Cir. Apr. 2, 2013); United States v. McDaniel, 631 F.3d 1204, 1208-1209 (11th Cir. 2011); United States v. Monzel, 641 F.3d 528, 535-537 (D.C. Cir.), cert. denied, 132 S. Ct. 756 (2011); cf. United States v. Crandon, 173 F.3d 122, 125-126 (3d Cir.) (applying proximate-cause requirement where defendant had personal contact with the victim), cert. denied, 528 U.S. 855 (1999).

The majority view is correct. As the courts of appeals have recognized, "Congress [is] presumed to have legislated against the background of our traditional legal concepts which render [proximate cause] a critical factor." Monzel, 641 F.3d at 536 (internal quotation marks omitted; brackets in original); accord Benoit, 2013 WL 1298154, at *15; Burgess, 684 F.3d at 457; Kearney, 672 F.3d at 96; United States v. Evers, 669 F.3d 645, 658-659 (6th Cir. 2012); Aumais, 656 F.3d at 153. By defining a "victim" as an individual harmed "as a result of" the defendant's offense conduct, Congress incorporated the preexisting "bedrock rule of both tort and criminal law that a defendant is only liable for harms he proximately caused." Monzel, 641 F.3d at 535 (footnote omitted).

Moreover, Congress used express proximate-cause language to describe the types of losses that are compensable under Section 2259. Although the phrase "proximate result" appears at the end of the catch-all subsection, several courts of appeals have reasonably read it as applying equally to the other enumerated categories. See Evers, 669 F.3d at 658-659; McDaniel, 631 F.3d at 1208-1209; cf. Porto Rico Ry., Light & Power Co. v. Mor, 253 U.S. 345, 348 (1920) ("When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all."). Other courts have explained that while "Congress determined that these restitution offenses typically proximately cause the losses enumerated in subsections 2259(b)(3)(A) through (E)," that does not mean "that a specific defendant automatically proximately causes those losses in every case." Fast, 709 F.3d at 721 (emphases omitted). At the very least, Congress's inclusion of an express proximate-cause requirement in the catch-all provision should not be read to abrogate "the traditional [proximate-cause] requirement for everything but the catch-all." Monzel, 641 F.3d at 537. If that had been Congress's intent, "surely it would have found a clearer way of doing so." Ibid.

b. Although the court of appeals therefore erred in concluding that Section 2259's proximate-cause requirement is

limited to the catch-all category of losses, further review is not warranted.

The circuit conflict that exists is exceedingly narrow: the Fifth Circuit is the lone outlier. And that disagreement has little practical importance. The presence or absence of a proximate-cause requirement should affect only those cases where the victim seeks to recover for losses that are unforeseeable. Cf. CSX Transp., Inc. v. McBride, 131 S. Ct. 2630, 2637 (2011) ("The term 'proximate cause' is shorthand for a concept: Injuries have countless causes, and not all should give rise to legal liability.") (citation omitted). The losses Amy seeks to recover -- the costs of future psychological counseling, future lost income, already-incurred attorney's fees -- are all foreseeable losses stemming from petitioners' possession of images of child pornography depicting Amy's sexual abuse. See Kearney, 672 F.3d at 97 (victim's need for "substantial mental-health treatment" as a consequence of a defendant's possession of her images was "reasonably foreseeable at the time of [the defendant's] conduct"). The majority rule simply acknowledges that, in a hypothetical case, a victim would not be able to recover losses that are not foreseeable, such as medical expenses incurred by a victim as a result of a car accident on the way to her therapist's office. See Monzel, 641 F.3d at 537 n.7; Burgess, 684 F.3d at 458 n.9; see also Laraneta, 700 F.3d at 991 (identifying other unforeseeable harms

that may not be compensable); Evers, 669 F.3d at 660 (finding link between child-care costs and the defendant's crime too attenuated where sex offender had previously provided free babysitting services). The Fifth Circuit apparently agrees that such losses should not be compensable, but suggests that any such limitation should come from the statutory definition of "victim." Pet. App. A27 n.13. Accordingly, the narrow disagreement that does exist should have little bearing on the outcome of these cases or any other cases implicated by the circuit split, as all circuits agree that the statute places limits on the losses a victim may recover.

2. Petitioner Wright also raises two additional arguments. First, he contends (12-8505 Pet. ii, 13-18) that the circuits are divided on the precise definition of proximate cause and suggests that the requisite showing of causation cannot be made for child-pornography possession offenses. Second, he asserts that only the Fifth Circuit allows a defendant to be held jointly and severally liable for the full amount of a victim's losses (12-8505 Pet. 18-22), and that this holding conflicts with the Court's decision in Hughey v. United States, 495 U.S. 411 (1990) (12-8505 Pet. 25-28). Further review of those related issues is also unwarranted.

a. Wright first contends (12-8505 Pet. ii, 13-18) that the courts of appeals are further divided on the precise definition of proximate cause and, in particular, whether it can ever "be shown for the crimes of receipt or possession of child pornography where

the defendant has had no contact with the child." As an initial matter, any definitional confusion is better understood as an issue of "cause in fact," rather than proximate cause. As the Seventh Circuit explained, "[b]efore a judge gets to the issue of proximate cause, he has to determine what the defendant caused." Laraneta, 700 F.3d at 991. The fundamental issue in nearly all of these cases is not whether harm caused by the offense conduct is too attenuated (i.e., proximate cause), but "how to assess causation where a large number of individuals each contributed in some degree to an overall harm." Kearney, 672 F.3d at 100 n.16; see id. at 98 (noting that the defendant's "argument is in actuality an unsuccessful attempt to use a but-for causation standard to limit * * * reasonably foreseeable losses"). Properly understood, the disagreement is not nearly as stark as Wright suggests.

Several courts of appeals have expressly rejected "the theory that the victim of child pornography could only show causation if she focused on a specific defendant's viewing and redistribution of her images and then attributed specific losses to that defendant's actions." Kearney, 672 F.3d at 99; accord United States v. Hargrove, No. 11-6131, 2013 WL 1694422, at *2-*3 (6th Cir. Apr. 19, 2013); Burgess, 684 F.3d at 459-460. Finding that "viewers and distributors of the child pornography" depicting victims like Amy indisputably "caused the losses she has suffered * * * on the aggregate level," they find "no reason to find [such cause] lacking

on the individual level." Kearney, 672 F.3d at 98; accord Hargrove, 2013 WL 1694422, at *3; Burgess, 684 F.3d at 460. Those courts rest, in part, on a "widely accepted" principle of tort law: "When the conduct of two or more actors is so related to an event that their combined conduct, viewed as a whole, is a but-for cause of the event, and application of the but-for rule to each of them individually would absolve all of them, the conduct of each is a cause in fact of the event." Kearney, 672 F.3d at 98 (quoting W. Page Keeton et al., Prosser and Keeton on Torts § 41, at 268 (5th ed. 1984); accord Hargrove, 2013 WL 1694422, at *3; Burgess, 684 F.3d at 459. An unduly restrictive definition of causation would effectively preclude courts from awarding restitution under Section 2259 for child-pornography possession and similar offenses. Because Congress made clear that restitution is "mandatory" "for any offense under" Chapter 110, which includes possessory offenses, any causation requirement that effectively exempts entire categories of defendants from restitution is inconsistent with congressional intent. See, e.g., Kearney, 672 F.3d at 97, 99.

Wright contends (12-8505 Pet. 13-15) that three circuits have nevertheless adopted a more restrictive approach. A closer examination of the relevant case law, however, suggests that victims of child-pornography possession offenses can still successfully prove the requisite causal connection and obtain a restitution award in each of those circuits. For example, Wright

relies on the Ninth Circuit's decision in Kennedy. Although the court did suggest that Section 2259's causation requirement may "continue to present serious obstacles for victims seeking restitution in these sorts of cases," 643 F.3d at 1266, on remand the district court awarded restitution to one such victim, see In re Amy, 698 F.3d 1151, 1152 (9th Cir. 2012), petition for cert. pending, No. 12-651 (filed Nov. 20, 2012). Moreover, in another recent case involving Amy and one other victim, the court found that the record included "sufficient evidence to establish a causal connection between [the] defendant's offense and [the victims'] losses," and it held that the district court had abused its discretion in refusing to order any restitution. In re Amy, 710 F.3d 985, 987 (9th Cir. 2013). On remand, the district court awarded $17,307.44 in restitution to Amy and $2881.05 to the other victim. See In re Amy & Vicky, No. 13-71486, 2013 WL 1847557, at *1 (9th Cir. May 3, 2013). Restitution thus remains available to victims like Amy in the Ninth Circuit.

The same is true of the Second and Eleventh Circuits. In Aumais, the Second Circuit appeared to require "evidence linking [the defendant's] possession to any loss suffered by" the victim. 656 F.3d at 154-155. The court, however, made clear that its decision did not "categorically foreclose payment of restitution to victims of child pornography from a defendant who possesses their pornographic images." Id. at 155. And, in a subsequent case, the

court found the causation standard met based on a similar record. See United States v. Hagerman, No. 11-3421, 2012 WL 6621311, at *3 (2d Cir. Dec. 20, 2012). Similarly, the Eleventh Circuit's decision in United States v. McGarity, 669 F.3d 1218 (11th Cir.), cert. denied, 133 S. Ct. 374 (2012), on which Wright relies, reaffirms an earlier decision which upheld a restitution award to another victim after concluding that "end-user defendants may proximately cause injuries to the victims of sexual child abuse." Id. at 1269 (citing McDaniel, supra). In the end, no court of appeals has adopted the sort of inflexible, individualized causation standard that would functionally preclude the award of restitution in all child-pornography possession cases.

b. Wright also contends (12-8505 Pet. 18-24) that the court of appeals erred in holding that he could be held jointly and severally liable, with other defendants in other cases, for the full amount of Amy's losses. The government agrees but, contrary to Wright's contention, that decision does not conflict with Hughey.

As the Sixth Circuit recently explained, the question is "whether a defendant should be liable for restitution for all of the losses a victim has suffered when, as here, he is but one of hundreds of causes of the injuries, and the contribution of each individual defendant cannot be differentiated." Gamble, 709 F.3d at 550. Every other court of appeals to directly answer that

question has concluded that apportionment is the better approach. See, e.g., Fast, 709 F.3d at 723 n.6; Gamble, 709 F.3d at 550-553; Burgess, 684 F.3d at 458-459; Aumais, 656 F.3d at 155-156. The government agrees. Section 2259 "is meant to ensure full restitution to the victim," but it "is also meant to hold the defendant responsible for the damage he caused, [and] not for damage he did not cause." Gamble, 709 F.3d at 552. Moreover, the law does not appear to contemplate joint and several liability "among defendants in different cases, before different judges, in different jurisdictions around the country," Aumais, 656 F.3d at 156 & n.5 -- particularly where, as here, federal law does not authorize an action for contribution, Laraneta, 700 F.3d at 992-993. In holding that defendants like Wright and Paroline could be held jointly and severally liable for the full amount of Amy's losses, the Fifth Circuit again stands as an outlier.

Contrary to Wright's contention (12-8505 Pet. 25-28), however, the court of appeals' decision does not conflict with Hughey. In Hughey, this Court explained that the term "offense," as used in the Victim and Witness Protection Act of 1982 (VWPA), Pub. L. No. 97-291, 96 Stat. 1248, referred to the defendant's "offense of conviction," 495 U.S. at 415-416, and that the VWPA therefore "authoriz[ed] an award of restitution only for the loss caused by the specific conduct that is the basis of the offense of conviction," id. at 413. The Court concluded that the VWPA did not

permit a district court to order restitution for conduct that formed the basis of counts that were dismissed as part of a plea agreement. Rather, the Court held that "the loss caused by the conduct underlying the offense of conviction establishes the outer limits of a restitution order." Id. at 420.

No court of appeals, including the court below, has addressed the relevance of Hughey to Section 2259. And that decision has no application to the restitution award at issue here. Wright was ordered to pay restitution to Amy based on his offense of conviction: possession of child pornography that included an image of Amy's sexual abuse. The district court did not order restitution for uncharged conduct. Nor did it award restitution based on conduct for which Wright was charged but not convicted. Hughey does not address whether or how a court may award restitution under Section 2259 when the defendant's offense of conviction caused harm to a victim -- but other defendants convicted of similar offenses also contributed to the victim's aggregate harm.

c. In any event, Wright's petition is not a suitable vehicle to resolve any of these issues. The court of appeals ultimately affirmed the district court's judgment, which did not "award Amy the full amount of her losses." Pet. App. A41-A42. The court explained that "because the Government did not appeal Wright's sentence and Amy did not seek mandamus review, under Greenlaw v.

United States, [554 U.S. 237, 246 (2008),] we must affirm Wright's sentence." Ibid. Accordingly, Wright has not actually been ordered to pay Amy the full amount of her losses.

More fundamentally, it is unclear whether Wright will have to pay Amy any restitution. Shortly after the panel decision in this case, Amy filed a letter in the district court withdrawing her restitution request with prejudice. See Amy Cert. Resp. App. 1-2. No court has resolved what impact Amy's withdrawal has on the district court's restitution order. This Court should not resolve that question, which has divided the courts of appeals, in the first instance. Compare United States v Johnson, 378 F.3d 230, 244-246 (2d Cir. 2004) (district court must impose restitution under the Mandatory Victims Restitution Act), with United States v. Pawlinski, 374 F.3d 536, 540-541 (7th Cir. 2004) (restitution must go to victims of crimes and court may not order restitution paid to the Crime Victims Fund in the absence of a victim recipient); United States v. Speakman, 594 F.3d 1165, 1174-1179 (10th Cir. 2010) (same). The uncertain status of the restitution award strongly counsels against further review.

Even if the restitution award is still enforceable, it is unlikely that Wright will ever pay anything close to the $529,661 ordered. Wright is indigent. The district court accordingly authorized a payment schedule based in significant part on Wright's ability to pay. Wright C.A. R.E. 94. To date, the Bureau of

Prisons has collected approximately $350 in restitution from Wright. Meanwhile, Amy has successfully recovered more than $1.6 million in less than five years, nearly half of her total losses. As the court of appeals recognized (Pet. App. A35), Amy is not entitled to double recovery. At the current rate of recovery, it is exceedingly likely that Amy will be fully compensated well before Wright pays any amount greater than the $5000 he suggests have been awarded by other courts (12-8505 Pet. 23).

3. a. Petitioner Paroline contends (12-8561 Pet. i, 14-15) that a restitution award entered in accordance with the court of appeals' decision would violate the Eighth Amendment's Excessive Fines Clause. Contrary to Paroline's suggestion (12-8561 Pet. i), the government did not make that argument below. Rather, the government observed that a construction of Section 2259 that adopts a proximate-cause requirement would have "the added virtue of avoiding" the district court's suggestion of a potential constitutional question. Gov't C.A. En Banc Br. 53. The court of appeals ultimately rejected any Eighth Amendment concerns, Pet. App. A37-A39, and that decision does not independently warrant further review.

In her response, Amy argues (Amy Cert. Resp. 24-28) that the court of appeals' Eighth Amendment holding implicates a different circuit conflict that does warrant this Court's review. Specifically, the court explained that it was "not persuaded that

restitution is a punishment subject to the same Eighth Amendment limits as criminal forfeiture" because "[i]ts purpose is remedial, not punitive." Pet. App. A37. Amy contends that the courts of appeals (and state courts) are divided on that question. Paroline, however, barely addresses that aspect of the court of appeals' decision in his petition, and he makes no mention of any purported conflict on that issue. See 12-8561 Pet. 14-15.

In any event, the court of appeals did not rest solely on its determination that restitution does not constitute punishment for Eighth Amendment purposes. The court explained that "[e]ven" if restitution were subject to the Excessive Fines Clause, "restricting the 'proximate result' language to the catchall category in which it appears does not open the door to grossly disproportionate restitution in a way that would violate the Eighth Amendment." Pet. App. A37. The court explained further that restitution is still "limited to losses arising out of a victim's injury" and that district courts "can ameliorate the impact of joint and several liability on an individual defendant by establishing a payment schedule." Id. at A37-A38. Amy does not suggest that this alternative holding is incorrect, or that it conflicts with the decision of any other court of appeals. Because the purported circuit conflict was not raised by Paroline, and because it is not outcome-determinative, further review is unwarranted.

b. Amy also contends that Paroline's petition (unlike Wright's petition) presents a good vehicle for this Court's review. See Amy Cert. Resp. 28-32. For the reasons discussed above, the government agrees that Wright's petition is an unsuitable vehicle. But Paroline's petition is also a poor vehicle, albeit for different reasons.

First, Paroline's petition raises only the threshold proximate-cause issue. As discussed above, that issue implicates an exceedingly narrow circuit conflict of little practical significance and it does not independently warrant this Court's review. The questions Amy refers to as "secondary" (Amy Cert. Resp. 24) -- i.e., how to define the requisite causation standard and how to apportion the loss among similarly situated defendants -- have substantially greater practical importance. The Court should consider the threshold proximate-cause issue, if at all, only in conjunction with these related issues, and Paroline's petition does not provide the Court with an opportunity to do so.

Second, Paroline's petition arises in an interlocutory posture, which "alone furnishe[s] sufficient ground for the denial" of the petition. Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916); see Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostock R.R., 389 U.S. 327, 328 (1967) (per curiam) (a case remanded to district court "is not yet ripe for review by this Court"); see also Virginia Military Inst. v. United

States, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition for a writ of certiorari). The en banc court of appeals vacated and remanded for further proceedings. See Pet. App. A41-A42. On remand, the district court will need to ascertain the "full amount" of Amy's losses and will ultimately enter an appropriate order of restitution memorialized in an amended judgment. At that point, Paroline will be able to assert his current contentions -- together with any other claims that may arise on remand -- in a single certiorari petition after the entry of the amended final judgment. See Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 508 n.1 (2001) (per curiam).

Third, Paroline's case comes to this Court on review of a mandamus petition. As the court of appeals recognized (Pet. App. A40), the only question presented is whether the district court's interpretation of Section 2259 was "clearly and indisputably" wrong. Amy suggests (Amy Cert. Resp. 29-30) that the mandamus posture makes Paroline's petition a more suitable vehicle because she is a party to the case and, accordingly, can provide an adversarial presentation of the issues. But whatever advantage that might afford is completely outweighed by the mandamus posture of this case, which limits the scope of review. If the Court wishes to definitively resolve any of the restitution issues

arising under Section 2259, it should do so in an appeal from a final judgment under a de novo standard of review.[6]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2013

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[6] To date, only eight other victims have sought restitution from defendants convicted of child-pornography possession, receipt, distribution, or transportation offenses under Section 2259. In recognition of the concerns raised by some courts about the current statutory scheme, see, e.g., Burgess, 684 F.3d at 460; Kennedy, 643 F.3d at 1266, the Department of Justice is exploring possible legislative amendments that would focus specifically on the proper approach to restitution for child-pornography offenses.

REPLY BRIEF

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NO. 12-8561

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

DOYLE RANDALL PAROLINE	§	PETITIONER
	§	
VS.	§	
	§	
THE UNITED STATES OF AMERICA	§	RESPONDENTS
and	§	
AMY UNKNOWN	§	

DOYLE RANDALL PAROLINE'S REPLY TO THE GOVERNMENT'S FILING OPPOSING GRANTING OF CERTIORARI

APPEAL CAUSE NO. 09-41238
IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CAUSE NOS. 09-41238 AND 09-41254
IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

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TO THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

COMES NOW DOYLE RANDALL PAROLINE, Petitioner herein, by and through his attorneys, **STANLEY G. SCHNEIDER, F.R. "BUCK" FILES and TOM MORAN,** and file this reply to the Government's brief opposing grant of certiorari and would show the Court as follows:

I. SUMMARY OF THE ARGUMENTS

This petition centers on whether persons convicted of possession of child pornography can be held jointly and severally liable for *all* damages caused to the child victim regardless of whether the defendant's crime of conviction was the proximate cause of the damages. Paroline finds himself in the unusual situation of agreeing with some of what the Government says. He disagrees, however, with the Government's opposition to granting review in a case in which the Fifth Circuit is the sole outlier among all of the courts of appeals.

Conflicts among the circuits is one of the most important considerations in the grant of certiorari. *See* SUP. CT. R. 10(a) (a United States court of appeals has entered a decision in conflict with another United States court of appeals on the same important matter). Unlike the Government, Paroline believes further discussion among the lower federal courts as to the application of 18 U.S.C. § 2259 would be of little help to this Court since all of the circuit courts of appeals have spoken.[1]

Requiring defendants in the Fifth Circuit *only* to be jointly and severally for multi-million

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[1]The circuit court cases conflicting with the instant case are: *United States v. Kearney*, 672 F.3d 81 (1st Cir. 2012); *United States v. Aumais*, 656 F.3d 147 (2nd Cir. 2011); *United States v. Crandon*, 173 F.3d 122 (3rd Cir. 1999) (in *dicta*); *United States v. Burgess*, 684 F.3d 445 (4th Cir. 2012); *United States v. Evers*, 669 F.3d 645 (6th Cir. 2012); *United States v. Laraneta*, 700 F.3d 983 (7th Cir. 2012); *United States v. Fast*, 709 F.3d 712 (8th Cir. 2013); *United States v. Kennedy*, 643 F.3d 1251 (9th Cir. 2011), *pet for cert. filed; United States v. Benoit*, No. 12-5103 (10th Cir. April 2, 2013) (not yet reported); *United States v. McDaniel*, 631 F.3d 1024 (11th Cir. 2011); *United States v. Monzel*, 641 F.3d 528 (D.C. Cir.), *cert. denied sub nom. Amy v. Monzel*, _ U.S. _, 132 S. Ct. 756 (2011).

dollar restitution awards defeats the Fifth Circuit's expressed intent to 1) limit victims to recovery of their full losses and 2) spread the restitution among all of those who possessed copies of the child's image. *In re Amy*, 701 F.3d 749, 768-71 (5th Cir. 2012) (*en banc*). If this Court denies review to resolve this conflict, defendants in Texas, Louisiana and Mississippi will be jointly liable for multimillion dollar restitution awards while those in 47 other states and the District of Columbia will be liable only for restitution for losses they proximately cause.

This would be an unjust and absurd result.

II. AREA OF AGREEMENT WITH THE GOVERNMENT

1. Paroline agrees with the Government that the majority of the courts of appeals are correct in requiring a showing of proximate cause in setting amounts of restitution pursuant to § 2259. Government's Brief at 15-17.

2. Paroline also agrees with the Government that the law does not provide for holding defendants such as him jointly and severally liable for all of the victim's losses in different cases before different judges all across the county. Government's Brief at 23-24.

3. Paroline further agrees with the Government that requiring a showing of proximate cause would avoid implicating the Eighth Amendment Excessive Fines Clause.

In this regard, the Fifth Circuit specifically found the Eighth Amendment was not implicated, 701 F.3d., at 772-73, an issue squarely presented to this Court in Paroline's second question for review.[2] Paroline asserts that assessing $3.4 million in restitution for possession of two images of

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[2] 2. Whether the Government is correct in its argument that authorizing $3.4 million in restitution against a defendant to a victim of child pornography who has never had contact with the defendant violates the Eighth Amendment ban on excessive fines in the absence

(continued...)

Amy is clearly excessive, especially when it is not coupled with a requirement that he proximately caused that loss.

III. AREAS OF DISAGREEMENT WITH THE GOVERNMENT

1. Paroline disagrees with the Government that proximate cause requirement makes a difference only if the damages are not foreseeable, such as medical expenses for injuries suffered in an accident on the way to her therapist's office. Government's Brief at 18.

2. Paroline also disagrees with the Government's broad view of the concept of proximate cause which exceeds any definition of the term used by this Court or courts in general. Government's Brief at 18-19.

3. Paroline disagrees that the conflict between the Fifth Circuit and the other circuits is narrow and should have little bearing on the outcome of the cases. Government's Brief at 19.

4. Paroline disagrees that review is improper because he is appealing what the Government styles as an interlocutory order. It asserts that after remand to the District Court he can raise the same issues on appeal of a new district court order.

A. Proximate Cause Is More Than Foreseeability of Loss

The Government relies on *CSX Transportation, Inc. v. McBride*, _ U.S. __, __, 131 S. Ct. 2630, 2637 (2011), for the proposition that proximate cause looks only to foreseeability of injury. Government's Brief at 18. This not only relies solely on *dicta*, but ignores the Court's holdings in *CSX Transportation*. That case involved a suit under the Federal Employers' Liability Act, 45

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[2](...continued)
of a proximate cause requirement in the setting of the amount of restitution assessed against that defendant.

U.S.C. § 51 *et. seq.* CSX Transportation complained that proximate cause is an element of liability under FELA and the Court rejected the argument and held FELA eliminated the concept of proximate cause in those cases. Thus, the Court did not apply or define proximate cause in *CSX Transportation.*

In its discussion of proximate cause, the *CSX Transportation* Court looked to the classic case of *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928), and specifically, Judge Andrews dissent. He described the proximate cause requirement this way: "Because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point." 248 N.Y., at 352, 162 N.E., at 103.

In *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), the Court directly dealt with the concept of proximate cause. There, the Court described the doctrine in these words:

> Here we use "proximate cause" to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts. At bottom, the notion of proximate cause reflects "ideas of what justice demands, or of what is administratively possible and convenient." Accordingly, among the many shapes this concept took at common law, was a demand for some direct relation between the injury asserted and the injurious conduct alleged.

503 U.S., at 268 (citations omitted).

As Justice Scalia wrote in another case,

> The term "proximate cause" is "shorthand for a concept: Injuries have countless causes and not all should give rise to legal liability. Life is too short to pursue every event to its most remote, "but for," consequences, and the doctrine of proximate cause provides a rough guide for courts in cutting off otherwise endless chains of cause and effect.

Pacific Operators Offshore, LLP v. Valladolid, _ U.S., _, _, 132 S. Ct. 680, 691-92 (2012) (Scalia, J., concurring) (internal citations omitted).

In the instant case, Paroline's act of possessing two pornographic images of Amy was not a

cause in fact, let alone proximate cause, of Amy's injuries. To the contrary, in the District Court, the parties stipulated that "None of the damages for which Amy is now seeking restitution flow from anyone telling her specifically about Mr. Paroline or telling her about his conduct which was the basis of the prosecution in this cause." Transcript of Hearing, October 28, 2009, at 18. It follows directly that there is no direct relation between the injuries asserted and Paroline's conduct as required by *Holmes* to establish proximate cause.

The Government's argument requiring only foreseeability of a type of injury to establish proximate cause flies in the face of this Court's holdings and the seminal case proximate cause , *Palsgraf*. For these reasons, this Court should reject the Government's arguments that the circuit conflict is minor.

B. The Government's View of Proximate Cause Is Fatally Flawed

The Government's view of proximate cause would remove the requirement of cause in fact and limit the proximate cause inquiry to whether it is foreseeable that actions of a specific type – possession of child pornography – could cause the type of injuries complained of *even if there is no evidence linking the actions to the injury*. This goes far beyond the concept of proximate cause used by this Court in *CSX Transportation*, *Pacific Operators* and *Holmes*. What proximate cause does is remove legal liability for remote causes of injuries. The Government would impose liability for restitution simply if there is a loss caused by someone (not necessarily the individual held liable) and the type of loss is foreseeable.

The Government's position that the split among the circuits is small flies directly in the face of a decision of the Second Circuit, holding that a victim impact statement and psychological evaluation prepared before a defendant was arrested cannot as a matter of law be proximately caused

by the defendant's acts. *United States v. Aumais*, 656 F.3d 147, 155 (2nd Cir. 2011). If Paroline was prosecuted in the Second Circuit he would have no restitution liability.

In the instant case, the District Court refused to order restitution to Amy because she was unable to establish what losses were the proximate result of Paroline's crimes. The distinction between the Fifth Circuit's holdings in the instant case and the Second Circuit's holdings in *Aumais* are not narrow. The differences have a result wider than the Grand Canyon.

C. The Effect of the Split Is Significant for those in the Fifth Circuit

The Government incorrectly asserts that the conflict among the circuits will have "little bearing on the outcome of these cases or any other cases implicated by the circuit split, as all circuits agree that the statute places limits on the losses a victim may recover." Government's Brief at 19. The practical effect of the split is the Fifth Circuit's holding Paroline would be liable for as much as $3.4 million in restitution without contribution or significant contribution from other defendants in other circuits.

While the Fifth Circuit in the instant case would make all other defendants convicted of possessing pornographic images of Amy jointly and severally liable with Paroline for restitution, it is unlikely that those in circuits with a proximate cause requirement for restitution would have significant restitution requirements, let alone joint and several liability for $3.4 million. Instead of being liable for restitution for *all* of Amy's injuries, they would be liable for restitution only for the injuries they as individuals caused. Therefore, the circuit split places those convicted in the Fifth Circuit at significant disadvantage compared to those convicted in the other 11 geographical circuits. Paroline and other Fifth Circuit defendants could be jointly and severally liable for restitution payments stemming from losses they did not proximately cause. And, they would be deprived of

credit for restitution paid by defendants in 47 other states and the District of Columbia.

While that might not seem significant to the Government, it has great practical significance to defendants – and victims. If this Court grants review and finds the majority of the circuits are correct in interpreting the statute, defendants would be liable for restitution only for losses caused by their crimes of conviction. If, on the other hand, it grants review and holds the Fifth Circuit is correct, victims conceivably will be entitled to greater total restitution awards and more pockets from which to collect them.

D. The Fifth Circuit Reviewed a Judgment, Not an Interlocutory Order

The Government's assertion that Paroline's petition is not ripe and is from an interlocutory holding from the Fifth Circuit would deprive Paroline forever from obtaining this Court's review of the central issue: whether proximate cause of losses is a requirement for determination of the amount of restitution. The Government's arguments flies in the face of the law of the case doctrine and effectively would prevent review by this Court of any circuit court decision vacating a judgment and remanding for a new trial.

The Fifth Circuit has held that the law of the case doctrine requires that when an appellate court decides on a rule of law, that decision continues to govern the same issues in subsequent stages of the same case. *United States v. Castillo*, 179 F.3d 321 (5th Cir. 1999), citing *Arizona v. California*, 460 U.S. 605, 618 (1983). An issue decided on appeal cannot be re-examined by the district court on remand or by the court of appeals on a subsequent appeal. *United States v. Lee*, 358 F.3d 315 (5th Cir. 2004).

The Fifth Circuit decided the issue of proximate cause and restitution in its revised *en banc* decision which is the subject of this petition. If the Court denies certiorari, the *en banc* Fifth

Circuit's decision becomes final and subject to the law of the case doctrine. Contrary to the Government's assertion, it would be unreviewable on a subsequent appeal.

Besides eviscerating the law of the case doctrine, the Government's position would result in denial of review by this Court of any case in which the lower courts vacated a judgment and remanded the cause for a new trial. Finally, in cases in which the Government takes an interlocutory appeal from, for example, granting of a motion to suppress evidence, under the Government's argument would be unable to seek review in this Court if the appellate court affirmed the trial court.

The Government's argument on page 30 of its brief – that on remand the District Court will enter an appropriate judgment setting restitution – would allow Paroline to assert his current contentions as well as any others that arise in a single petition for certiorari apply with equal force to all cases remanded for new trials. When a case is reversed and remanded for trial, judgments are vacated and cases are remanded for further proceedings presumably resulting in the entry of a new judgment.

E. Excessive Fines Clause: $3.4 Million Restitution, Possession of Two Images

This Court must also address the second question presented for review concerning the application of the Eighth Amendment to any order requiring payment of $3.4 million by a person who possessed two images of pornography. Paroline, in his petition clearly states that the *en banc* Fifth Circuit opinion conflicts with this Court's holding in *United States v. Bajakian*, 524 U.S. 321 (1998). 701 F.3d, at 771. In *Bajakian*, this Court held that a forfeiture of property grossly disproportionate to the crime violates the Eighth Amendment. The Fifth Circuit rejected the Government's argument that construing § 2259 without a proximate cause requirement could result in an Excessive Fines Clause violation. 701 F.3d., at 771-72.

In her response, Amy supports Paroline's position, detailing a very clear and mature circuit split on this issue – among both the federal courts of appeals and state courts. Amy agrees that the Court below squarely held that "we are not persuaded that restitution is a punishment subject to the same Eighth Amendment limits as criminal forfeiture. Its purpose is remedial, not punitive." That holding is squarely presented for this Court's review by a decision below that requires a convicted defendant to pay approximately $3.4 million in restitution. This is more than the average lifetime earnings of an American citizen.

To be sure, the Court below also noted that payments for a $3.4 million restitution award could be spread out via a payment schedule. But that does not deny the harshness of the award itself. Moreover, the Government bizarrely states that "Amy does not suggest that this alternative holding is incorrect, or that it conflicts with the decision of any other court of appeals." Of course, Amy wouldn't challenge this ruling. It is Paroline who both argues that this holding is incorrect and that it conflicts not only with the decision of this Court in *Bajakian* (a sufficient ground for review by itself)[3] as well as other Courts of Appeals that would scrutinize such an award for compliance with the Eighth Amendment. *See, e.g., United States v. Dubose*, 146 F.3d 1141 (9th Cir. 1998), *cert. denied*, 525 U.S. 975 (1998) (restitution is punishment under the 8th Amendment); *United States v. Siegel*, 153 F.3d 1256, 1259 (11th Cir. 1998) (same); *see also United States v. Lessner*, 498 F.3d 185, 205 (3d Cir. 2007), *cert. denied*, 552 U.S. 1260 (2008); *United States v. Bollin*, 264 F.3d 391, 419 (4th Cir.), *cert. denied*, 534 U.S. 935 (2001).

Of course, the legal issue for this Court is not (as the Government tries to imply) whether a

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[3] Of course, a decision of a Court of Appeals in conflict with a decision of this Court is reason standing alone to grant certiorari. *See, e.g., Army & Air Force Exchange Service v. Sheehan*, 456 U.S. 728, 733 (1982).

particular dollar amount in restitution would or would not comply with the Eighth Amendment. Instead, the issue is whether Eighth Amendment scrutiny is in play at all in restitution awards. To Paroline, it seems obvious that a $3.4 million restitution award for a defendant who never met Amy and whose only crime was possessing two pornographic images would be "excessive" under the Eighth Amendment. But this Court should grant certiorari to resolve the legal issue of the applicability of the Eighth Amendment in such settings and then, after reversing the decision below that it is inapplicable, reverse for further proceedings to finally resolve the question.

IV. CONCLUSION

The Government would have this Court deny review of a decision by the *en banc* Fifth Circuit which conflicts with the holdings of every other circuit which has considered the issue. The Government, which agrees with many of Paroline's legal contentions, would have this Court do so based on misapplication of the law of proximate cause, by stating incorrectly that the circuit split is of little or no moment and by ignoring the law of the case doctrine. Paroline asserts the circuit split is significant and could cause massive differences in treatment of defendants in the Fifth Circuit and every other circuit which has considered the issue.

Eleven circuits have held that a victim must show that all her losses were the proximate result of an individual defendant's crime in order to obtain full restitution.. *See* n. 1, *supra*.

The Fifth Circuit reviewed some of these decisions and specifically rejected them. Paroline App. 41 ("we reject the approach of our sister circuits and hold that § 2259 imposes no generalized proximate cause requirement"). The Fifth Circuit noted that these decisions are fractured in their views and reasoning. In surveying the other decisions, the Fifth Circuit en banc quoted the First Circuit's description of the landscape: "[a]ny 'seeming agreement on a standard [in the circuits]

suggests more harmony than there is.'" 701 F.3d., n. 12 at 765 (quoting *Kearney*, 672 F.3d at 96); *accord Kennedy*, 643 F.3d at 1260 (noting that construing Section 2259 presents "[a] difficult issue of statutory interpretation [which] has been considered, but not satisfactorily resolved, by several of our sister circuits.").

Among the 11 circuits holding that § 2259 contains a general proximate result requirement, the rationales have varied widely. The Ninth Circuit and the Eleventh Circuit rely on statutory interpretation to find a general proximate cause limitation. *See Kennedy*, 643 F.3d at 1261-62 and *McDaniel*, 631 F.3d at 1208-09 (same). Four other circuits have rejected the Ninth and Eleventh Circuits' reasoning, holding instead that "traditional principles of tort and criminal law" require a general proximate cause limitation. *Monzel*, 641 F.3d at 535 ("Unlike those circuits, however, our reasoning rests not on the catch-all provision of § 2259(b)(3)(F), but rather on traditional principles of tort and criminal law. . . ."); *see also Burgess*, 684 F.3d at 456-57("declin[ing] to adopt this line of reasoning [relying on statutory language]."); *Aumais*, 656 F.3d at 153 (recognizing competing lines of reasoning and "endors[ing] the D.C. Circuit's reasoning."); *see also Benoit*, 2013 WL 1298154 at *15 (agreeing with *Monzel* and *Burgess*). The Sixth Circuit noted these diverging principles, but concluded "[w]e need not choose between the rationales." *Evers*, 669 F.3d, at 659. The First Circuit acknowledged the disagreement, but it developed its own resolution by imposing a general proximate result requirement, while concluding that the requirement could be shown in the "aggregate" rather than at the "individual" level. *Kearney*, 672 F.3d, at 98. The Eight Circuit has followed the First Circuit. *Fast*, 709 F.3d at 721. The Seventh Circuit held that a proximate result requirement exists, but that it results in full liability (i.e., joint and several liability) for any offender who has *distributed* child pornography but not an offender who has *possessed* that pornography.

United States v. Laraneta, 700 F.3d, at 990-92.

This is an issue which is both significant and, considering the number of child pornography cases being filed in federal courts, of widespread importance to many persons, defendants and victims alike.

The Government's argument that the issue should percolate further among the lower courts, Government's Brief at 14, is clearly without merit. Eleven of the twelve circuits have decided the issue. Only the Fifth Circuit has held differently. Further percolation among the lower federal courts will not clarify the issues for this Court. And, since the cases involve construction of a federal statute, it is highly unlikely that a state court will opine on the issue.

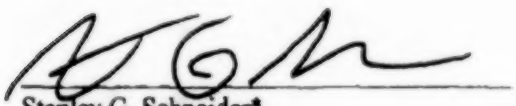
The issue is ripe for this Court's review. The circuit courts have set out their views and it is time for this Court to consider the issue and give the lower courts a principled structure for setting restitution amounts and reviewing § 2259 restitution orders.

Paroline's petition presents straightforward issues of law – legal positions which the Government has agreed with in the lower courts and in this Court. In considering whether to grant review, the Court should bear in mind SUP. CT. R. 16(a)(1), allowing it to grant certiorari along with a summary disposition.

This Court should reject the Government's arguments and grant certiorari.

Respectfully submitted,

Schneider & McKinney, P.C.



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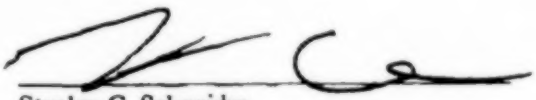
I certify that a true and correct copy of the above document was served on the following persons by mailing them copies, postage paid, on this 20th day of May, 2013.



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January 29, 2013

William K. Suter, Clerk
Supreme Court of the United States
#1 First Street N.E.
Washington, D.C. 20543

Re: *Doyle Randall Paroline v. United States of America and Amy Unknown*, No. 12-8505

Dear General Suter:

Enclosed herein please find an original and ten copies of Doyle Randall Paroline's Reply to the Government's Filing Opposing Granting of Certiorari.

Sincerely,

Belen Vara

Belen Vara
Legal Assistant
to Stanley G. Schneider

cc:

– Donald B. Verrilli, Jr.
– James R. Marsh
– Paul Cassell

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IN THE SUPREME COURT OF THE UNITED STATES

Nos. 12-8505 and 8561

MICHAEL WRIGHT,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

DOYLE RANDALL PAROLINE,
Petitioner,

versus

AMY UNKNOWN and UNITED STATES,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER WRIGHT'S REPLY TO UNITED STATES' BRIEF IN OPPOSITION

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ARGUMENT ON REPLY

The Government agrees with petitioner Wright that the Fifth Circuit erred: (a) in holding that § 2259 does not require a showing of proximate causation for all types of losses, and (b) in holding that each defendant convicted of possessing a victim's image is jointly and severally liable for all of the victim's losses resulting from internet circulation of her image. The Government also acknowledges a circuit split on both issues. Nevertheless, the Government urges this Court to deny review. This position turns out to be as curious after scrutiny as it appears at first blush.

1. A grant of certiorari is necessary to establish uniformity in applying § 2255.

The Government asks the Court to deny review because the Fifth Circuit stands alone in rejecting a proximate-causation requirement for all compensable losses. This is not a reason to deny review.[1] Government Opposition ("Govt. Opp.") at 18. Giving an issue time to "percolate" in the lower courts, Govt. Opp. at 14, makes sense when positions are in flux. That is not the case on the issue of proximate causation. Nearly all the circuits had weighed in when the Fifth Circuit rendered its *en banc* decision. The Fifth Circuit considered and rejected the position of the other circuits. See slip op. at 26-31. The only way to achieve uniformity at this point is for this

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[1]Since Wright filed his petition, two more circuits have joined the nine which require proximate causation. See *United States v. Fast*, 709 F.3d 712, 721-22 (8th Cir. 2013); *United States v. Benoit*, 713 F.3d 1, 20 (10th Cir. 2013).

Court to decide the issue. Until then, every defendant convicted of possessing Amy's image in the Fifth Circuit will be ordered to pay $3.4 million in restitution under established circuit law, see slip op. at 39,[2] while similarly situated defendants in other circuits will pay a minute fraction of that amount, if anything. The largest award affirmed by a circuit court other than the Fifth is, to counsels' knowledge, $17,304.44. See *In re Amy and Vicky*, ___ F.3d ___, 2013 WL 1847557, at *1-2 (9th Cir. May 3, 2013). More than one in ten federal child pornography cases – 210 out of 1855 nationally in FY 2011 – are from the Fifth Circuit. U.S. Sentencing Comm'n, *Statistical Information Packet, Fiscal Year 2011, Fifth Circuit* 3 tbl.1 (2012), at http://tinyurl.com/CPstat5. The Court should not let this disparity fester.

2. A proximate-cause requirement would substantially limit compensable harm.

Despite the huge difference between the amount of restitution required in the Fifth Circuit and elsewhere, the Government asserts that a proximate-cause requirement will make little difference in practice because the losses Amy claims are reasonably foreseeable. Govt. Opp. at 18. The Government, however, addresses only the *types* of losses that Amy seeks. The type of loss is not the only consideration. It

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[2]The only reason that the *en banc* Court affirmed the district court's order that Wright pay only a half-million dollars – the entirety of Amy's emotional distress damages – was that the Government did not appeal and Amy did not seek mandamus. Slip op. at 41. It still characterized the award as an error because it was less than $3.4 million. *Id.* ("While the district court erred in failing to award Amy the full amount of her losses . . .").

most certainly was not reasonably foreseeable to Wright that his personal conduct downloading Amy's images would cause her $3.4 million in damages. See *United States v. Wright*, 639 F.3d 679, 683 (5th Cir. 2011) (panel op.) (finding that Wright was unaware "of the potential scope"of the restitution he would be ordered to pay when entering into the plea agreement). Indeed, an individual looking at an image on his computer likely would think the person depicted would never know he had done so. Nor, as a matter of logic, could Wright have foreseen at the time of his offense conduct damages inflicted previously by others See *United States v. Carreon*, 11 F.3d 1225, 1235 (5th Cir. 1994) ("Applying foreseeability only prospectively comports with the plain meaning of the term 'foreseeable.'"). A proximate cause requirement would substantially limit the amount of restitution that could be ordered.

3. Certiorari should also be granted to decide whether restitution under § 2259 is limited to conduct factually caused by the individual defendant.

The real difficulty in applying § 2259, according to the Government, is how to decide the amount of harm a particular defendant caused. This, the Government says, is a question of cause-in-fact, not proximate causation. Govt. Opp. at 19-20; see also *United States v. Laraneta*, 700 F.3d 983, 991 (7th Cir. 2012). The problem which the Government identifies, however, does not arise unless courts hold that restitution is

limited to harm which the particular defendant in fact caused. This Court must decide that question – whether restitution under § 2259 is limited to the harm factually caused by the particular defendant's offense – before it can address the Government's question of how to quantify the harm. That is why Wright posed his second question to the Court in his petition: "is restitution under § 2259 limited to those losses caused by the conduct underlying the offense of conviction, as required by *Hughey v. United States*, 495 U.S. 411 (1990)?" Petition at ii.

The Fifth Circuit does not limit § 2259 restitution to losses caused in fact by the particular defendant. Rather, it holds that every defendant who caused any portion of Amy's harm, no matter how small, is liable for the entire amount. In petitioner's case, the *en banc* court held that "the district court erred in failing to award Amy the full amount of her losses," that is, the entire $3.4 million that she claimed. Slip op. at 41. The only reason that the court affirmed Wright's $529,661 restitution order was that Wright's case came to the court solely on Wright's appeal; neither the Government appealed nor did Amy seek mandamus. *Id.* (citing *Greenlaw v. United States*, 554 U.S. 237, 246 (2008)).

Nevertheless, the $529,661 restitution award was not limited to losses caused by Wright. It was comprised mainly of the projected $512,681 cost of the mental health treatment that Amy would need as a result of "the sexual assault perpetrated

against [her]" by her uncle "and its continued memorialization in pictures which continue to be traded and used" by all sorts of people, not just Wright. See Sentencing Transcript, p. 12; Letter of Stan E. Smith, Ph.D., to James R. Marsh (Sept. 15, 2008), pp. 3-4; Report of Psychological Consultation by Joyanna L. Silberg (Nov. 21, 2008), p. 8.[3] Wright, however, did not cause the entirety of Amy's emotional distress losses. Amy's restitution request, on its face, seeks compensation for the aggregate losses caused by *all* the people who distributed, traded, received or possessed her images on the internet. As the Seventh Circuit observed in *United States v. Laraneta*, "it is beyond implausible that victims would have suffered the harm they did had [the individual defendant] been the only person in the world to view pornographic images of them." 700 F.3d at 981. Hence, contrary to the Government's assertion (Govt. Opp. at 25), Wright *was* ordered to pay restitution for

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[3]At sentencing, the district court stated that the restitution amount of $529,551 "was reached by adding the estimated cost of the victim's future treatment and counseling at $512,681, and the cost of the victim's expert witness fees at $16,980." Sentencing Tr., p. 12. The $512,681 figure was derived by the Smith Economics Group, based on a psychological evaluation which concluded that Amy would require weekly counseling for the remainder of her life and three institutionalizations. See Letter of Stan E. Smith, Ph.D., to James R. Marsh (Sept. 15, 2008), pp. 3- 4. The evaluator, psychologist Joyanna L. Silberg, Ph.D., based her prognosis on her conclusion that, "The sexual assault perpetrated against Amy, and its continued memorialization in pictures which continue to be traded and used affect her in a variety of ways, and has had long lasting and life changing impact on her." Report of Psychological Consultation (Nov. 21, 2008), p. 8. (The Smith letter and the Silberg report were included in the materials submitted by Amy to the Government and introduced into the record by the Government at sentencing and by Amy during the appeal.) The difference between the $3.4 million that Amy requested and the $529,611 awarded consisted largely of expected loss of income. The district court did not explain why it awarded nothing for expected lost income in Wright's case.

harm caused by conduct which he did not commit.

The other circuits refuse to order restitution for losses which the defendant did not cause. The Sixth Circuit recently explained in *United States v. Gamble*, 709 F.3d 541, 552 (6th Cir. 2013), that § 2259 "is . . . meant to hold the defendant responsible for the damage he caused, but not for the damage he did not cause, as evidenced by the causation requirement." See also *Larnaneta*, 700 F.3d at 991; *United Sates v. Burgess*, 684 F.3d 445, 460 (4th Cir.), cert. denied, 133 S. Ct. 490 (2012); *United States v. Monzel*, 641 F 3d 528, 538 (D.C. Cir.), cert. denied, 132 S. Ct. 756 (2011). Wright's case squarely presents the question of which side of the circuit split is correct.

This issue is a reason that certiorari should be granted not only in Paroline's case but in Wright's case as well. In Paroline's case, the district court denied *any* restitution for lack of proof of proximate causation. It found that the Government had failed to prove any proximately-caused harm. In Wright's case, the Fifth Circuit affirmed an award of restitution for harm caused by offenders other than Wright. Hence, while Paroline's case highlights the question whether an individual possessor causes any compensable harm, Wright's case presents the additional question whether a defendant can be ordered to pay for harm caused by others.

4. The principles of *Hughey* apply to § 2259 restitution.

It is hard to see why the Government would argue that *Hughey v. United States*, 495 U.S. 411 (1990), does not apply to a restitution order which, like Wright's, requires a defendant to pay for harm he did not cause. Govt. Opp. at pp. 24-25. The animating principle in *Hughey* is that restitution "is intended to compensate victims only for losses caused by the conduct underlying the offense of conviction" when the authorizing statute is couched in terms of "the offense." *Id.* at 416. The statute interpreted in *Hughey* was the Victim and Witness Protection Act of 1982, but circuit courts subsequently extended its holding to the Mandatory Victim Restitution Act on the basis of similar language. See, e.g., *United States v. Mancillas*, 172 F.3d 341, 343 (5th Cir. 1999). Section 2259(a) contains offense-centric language similar to that on which the *Hughey* Court relied: "[T]he court shall order restitution for any *offense* under this chapter." (emphasis added). Therefore, as in *Hughey*, § 2259 restitution should be limited to harms caused by the offense of which the particular defendant was convicted.[4]

It turns out that the Government's real objection is that *Hughey*, with its limitation of restitution to conduct caused by the defendant's offense conduct, does

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[4]While the Fifth Circuit did not cite *Hughey*, it necessarily rejected Wright's argument that restitution can be ordered only for losses caused by his own offense conduct. See Brief for Appellant Wright on rehearing *en banc* (Feb. 24, 2012), pp. 13-18; see also Brief for Appellant Wright to panel (July 13, 2010), pp.10-19; Defendant Wright's Sentencing Memorandum (Dec. 11, 2009).

not comport with the Government's proposal to aggregate the conduct of all defendants convicted of distributing, receiving or possessing the victim's images and to find the requisite causal connection in the aggregated conduct. Govt. Opp. at 25. The merits of the aggregation approach aside, the Fifth Circuit's approach was different. The Fifth Circuit held that a person who qualified as a "victim" in a criminal case was entitled to recover from the individual defendant losses caused by everyone who had victimized her, while the Government would apportion those losses. The Fifth Circuit's decision is the position which Wright asks this Court to review. That decision is inconsistent with *Hughey*.

5. Where circuits require a causal connection to the conduct of the individual defendant, restitution awards are a small fraction of the amount the Fifth Circuit requires.

The Government argues that even those circuits most insistent on a clear causal connection between the defendant's conduct and the victim's specific loss have affirmed restitution awards under § 2259. Govt. Opp. at 21-23. Those awards, however, are only a small fraction of the restitution required by the Fifth Circuit. *United States v. Hagerman*, 827 F. Supp. 2d 102 (N.D.N.Y. 2011), rev'd in part, No. 11-3421-cr, 2012 WL 6621311 (2nd Cir. 2012), highlights the difference. In *Hagerman*, the district court ordered $975,914 in restitution, jointly and severally with others convicted of viewing Vicky's images. The $975,914 figure was the

amount of Vicky's total losses which remained unpaid. The Second Circuit reversed the award because Hagerman could not be required to pay more than the amount of loss that he had caused. The district court estimated that amount as .68% or 1/146 of the total loss. The Second Circuit found this latter approach reasonable and applied it to limit Hagerman's liability to $8,388,31. *Hagerman*, 2012 WL 6621311, at *4.

Likewise in *In re Amy and Vicky*, ___F.3d ___, 2013 WL 1847557, at *1-2 (9th Cir. May 3, 2013), the Ninth Circuit affirmed restitution awards consisting of 1/171 of the total losses sustained by Amy and 1/309 of the total losses sustained by Vicky. See *United States v. Cantrelle*, No. 11-cr-542, 2013 WL 1624824, at *7-10 (E.D. Cal. May 3, 2013). The resultant awards were $17,307.44 and $2,881.95, respectively. (Of note, the pool of losses did not include losses incurred before the date of the defendant's offense or attorney and expert witness fees that could not be traced to the specific case.) To Wright's knowledge, the $17,307.44 award to Amy is the largest amount of restitution affirmed on appeal elsewhere than the Fifth Circuit.

Far from counseling against the grant of certiorari, these cases illustrate why this Court should address the Fifth Circuit's interpretation of § 2259: the disparity in outcome is too great.

6. The Government's method for apportioning losses does not reduce the need for this Court to review the Fifth Circuit's decision.

Lest this Court believe that certiorari is not necessary because the Government's aggregation approach will prevail once it "percolates" through the circuits,[5] petitioner asks the Court to note *United States v. Benoit*, 713 F.3d 1(10th Cir. 2013). There, the Tenth Circuit joined the ranks of circuits requiring proximate-causation but also rejected an $11,466 restitution award calculated by the Government's method of dividing aggregate loss by the number of restitution judgments for the victim. *Id.* at 22. "This implicit calculation does not meet the proximate cause standard we have announced on the record before us," the court

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[5]Contrary to the Government's representation, Govt. Opp. at 21, an aggregation model is used in only limited types of tort cases. Under the aggregation model,

> the conduct of all defendants as a group is aggregated and considered as a whole. The but-for test is then applied to their conduct taken as a unit or set. If the combined conduct is a but-for cause of the plaintiff's harm, then cause is established.

Dan B. Dobbs et al., THE LAW OF TORTS § 189 at 634-35 (2nd ed.). The decision whether to aggregate is a policy decision, "which may generate further legal issues, this time over the criteria for the policy decisions." *Id.* Furthermore,

> [a]ggregation is routinely performed in cases of tortfeasors who act in concert and with tortfeasors who, through acting independently, create a single indivisible injury. *The question is whether aggregation represents a useful tool beyond those situations.*

Id. at 635 n.19 (emphasis added). The prototypical use is in asbestos litigation, where the plaintiff has contracted cancer as a result of prolonged exposure to asbestos manufactured by various companies. See, e.g., *Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W. 2d 854, 857 (Iowa 1994). By contrast, Amy is allegedly injured each time someone views her image. Unlike asbestos cases, her injuries are discrete rather than indivisible.

stated. *Id.* "[T]he district court did not make factual findings as to whether the number of judgments was approximately equal to the number of end-users or whether [the defendant] caused approximately the same amount of damages as other end-users." *Id.* at 22 n.8. Distributors, for example, would cause more harm than a possessor like Wright, yet there is no way to estimate how much more. See *Cantrelle*, 2013 WL 1624824, at *6 (rejecting Government's threefold enhancement for distribution as "precisely the kind of arbitrary calculation prohibited by [*United States v.*] *Kennedy*[6] . . . ."). In sum, aggregation with apportionment is not a panacea that would cause the Fifth Circuit to change its position without intervention by this Court.

7. The fact that the amount petitioner pays in restitution will be reduced by the amount other defendants pay to Amy does not lessen the need for certiorari.

Finally, the Government argues that certiorari is unnecessary because Wright will not have to pay the full $522,681 ordered by the district court since the award was joint and several. Govt. Opp. at 26-27. Half of Amy's losses already have been recovered, the Government continues, and Wright's periodic payments are relatively low because he is indigent. This same argument would apply to the vast majority of defendants who follow in Wright's footsteps; most will not have deep pockets. As

[6] 643 F.3d 1251 (9th Cir. 2011).

a result, under the Government's line of reasoning review of the Fifth Circuit's application of § 2259 would never be appropriate. At the same time, however, the Government contends that joint and several liability is improper in cases with only one defendant. Govt. Opp. at 23-24. Hence, the Government's anomalous position would insulate from review a sentencing practice that it believes is wrong.

The problems with an award of restitution subject to joint and several liability go beyond the colossal amount that the defendant is ordered to pay. First, the amount the defendant will actually be required to pay is indeterminate. From the defendant's perspective, he will be required to continue paying whatever amount the Government (be it the Bureau of Prisons or the Probation Office) tells him he must pay until it tells him he does not have to pay any more. Second, the amount which the defendant ultimately pays will not be related to his culpability. Instead, the determinant factors are the defendant's wealth and the fortuity of how much money the victim already has recovered. This Court has stated that "[r]estitution is an effective rehabilitative penalty because it forces the defendant to confront, in concrete terms, the harm his actions have caused." *Kelly v. Robinson*, 479 U.S. 36, 49 n.10 (1986). A huge restitution award with joint and several liability breaks the link between conduct and consequences. Accordingly, it is not an appropriate punishment.

8. Other considerations

Petitioner relies on and incorporates his Supplemental Brief in Reply to Amy Unknown's Response to Paroline's Petition (May 8, 2013), to respond to the Government's arguments about the suitability of his case as a vehicle for the grant of certiorari.

CONCLUSION

Petitioner Michael Wright asks the Court to grant a writ of certiorari to the Fifth Circuit Court of Appeals. The Fifth Circuit's application of § 2259 is incorrect because it requires restitution for losses which were neither factually nor proximately caused by the defendant's offense. With the Fifth Circuit's position entrenched, this Court's intervention is necessary to obtain uniformity.[7]

Respectfully submitted this 20th day of May, 2013,

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[7]In the event the Court grants certiorari on the proper application of § 2259 in a case other than Wright's, petitioner asks the Court to hold his case until the other case is decided.

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of May, 2013, a copy of the foregoing has been served on Brian Klebba and Diane Hollenshead Copes, Assistant United States Attorneys, 650 Poydras Street, 16th Floor, New Orleans, Louisiana, 70130, via hand delivery, and on Donald B. Verrilli, Jr., Solicitor General of the United States, Mythili Raman, Acting Assistant Attorney General, and Michael A. Rotker, Attorney, Department of Justice, 950 Pennsylvania Avenue N.W., Washington, D.C. 20530, Paul G. Cassell, University of Utah School of Law, Room 101, 332 S. 1400 East, Salt Lake City, Utah 84112, and Stanley George Schneider, Schneider & McKinney, 440 Louisiana, Suite 2110, Houston, Texas 77002, by placing same in the United States mail, properly addressed and postage prepaid.

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JOINT APPENDIX

RECORD
AND
BRIEFS

No. 12-8561

In The
Supreme Court of the United States

DOYLE RANDALL PAROLINE,

Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT APPENDIX
VOLUME I

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Petition For Certiorari Filed January 31, 2013
Certiorari Granted June 27, 2013

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RELEVANT DOCKET ENTRIES FOR THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

Date Filed	#	Docket Text
01/09/2009		Arrest of Doyle Randall Paroline (kls,) (Entered: 01/12/2009)
01/09/2009	4	CONSENT to Administration of Guilty Plea and Fed.R.Crim.P.11 Allocution by U.S. Magistrate Judge by Doyle Randall Paroline (kls,) (Entered: 01/12/2009)
01/09/2009	6	SEALED PLEA AGREEMENT as to Doyle Randall Paroline (kls,) (Entered: 01/12/2009)
01/12/20091	1	INFORMATION as to Doyle Randall Paroline (1) count(s) 1. (kls,) (Entered: 01/12/2009)
01/12/2009	2	WAIVER OF INDICTMENT by Doyle Randall Paroline (kls,) (Entered: 01/12/2009)
01/12/2009	3	Minute Entry for proceedings held before Magistrate Judge John D. Love: Frank Coan for Bill Baldwin, Buck Files for Dft. Initial Appearance and Plea Agreement Hearing as to Doyle Randall Paroline held on 1/12/2009, Plea entered by Doyle Randall Paroline (1) Count 1Doyle Randall Paroline (1) Guilty Count 1. Dft. remanded to custody of USM.

(Court Reporter Ecro: S. Guthrie.) (kls,) (Entered: 01/12/2009)

02/03/2009 8 ORDER ADOPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE as to Doyle Randall Paroline for 7 Report and Recommendation on Guilty Plea. Signed by Judge Leonard Davis on 2/3/2009. (kls,) (Entered: 02/03/2009)

03/20/2009 9 SEALED OBJECTION TO PRESENTENCE INVESTIGATION REPORT by Doyle Randall Paroline (kls,) (Entered: 03/23/2009)

06/08/2009 10 SENTENCING MEMORANDUM by Doyle Randall Paroline (Attachments: # 1 Exhibit) (Files, F R) (Entered: 06/08/2009)

06/10/2009 13 ORDER severing the restitution determination from the sentencing proceeding. The Court orders all interested parties, including the Government, the deft, probation, and "Amy" to submit briefs on the issues raised by the Court by 720-09. The Court invites briefing from any other interested party by the same date. The Court will hear evidence and oral arguments on these issues and the amount, if any, and manner of assessing restitution in this case on 8-04-09 at 10:00 a.m. Although deft retained counsel for his plea and sentencing proceedings, the Court

now finds the deft indigent and appoints F.R. Files Jr to represent him during the restitution proceedings. The Clerk is directed to add "Amy" and her counsel, James R Marsh, as a party/victim to this case. Mr Marsh is ordered to file a copy of this Order in every case in which "Amy" has filed a Request for Restitution with an appropriate cover page identifying the pendency of this action and this Court's invitation for any interested party to file a brief or statement of interest in this case in accordance with this Order's Briefing Schedule. The Clerk shall also transmit a copy of this order to the National Center for Missing & Exploited Children, Alexandria, Virginia. Signed by Judge Leonard Davis on 06/10/09. cc:attys 6-10-09 (mll,) (Entered: 06/10/2009)

06/10/2009 14 **Minute Entry – 6.10.2009 Sentencing** for proceedings held before Judge Leonard Davis:Sentencing held on 6/10/2009 for Doyle Randall Paroline (1), Count(s) 1, Imprisonment for a term of 24 Months; Fine Waived; Restitution to be Determined; $100 Special Assessment; 10 Years Supervised Release. Court ordered Restitution Proceedings be severed. Dft advised of right to appeal & court appointed counsel. Dft REMANDED

to USM. (Court Reporter Shea Sloan.) (rlf,) (Entered: 06/10/2009)

06/10/2009 15 SEALED PRESENTENCE INVESTIGATION REPORT (Sealed) as to Doyle Randall Paroline (rlf,) (Entered: 06/10/2009)

06/10/2009 16 SEALED PSI – SENTENCING RECOMMENDATION as to Doyle Randall Paroline (rlf,) (Entered: 06/10/2009)

06/10/2009 17 SEALED ADDENDUM TO PRESENTENCE INVESTIGATION REPORT (Sealed) as to Doyle Randall Paroline (Attachments: # 1 CV of Eric Holden; # 2 Holden's Report; # 3 CV of Timothy Proctor; # 4 Proctor's Report; # 5 CV of Wade French; # 6 French's Report; # 7 Sentencing Letters; # 8 Defendant's Statement)(rlf,) (Entered: 06/11/2009)

06/15/2009 18 JUDGMENT as to Doyle Randall Paroline (1), Count(s) 1, Imprisonment for a term of 24 Months; Fine Waived; Restitution to be Determined; $100 Special Assessment; 10 Years Supervised Release. Signed by Judge Leonard Davis on 6/15/2009. (kls,) (Entered: 06/15/2009)

06/15/2009 19 SEALED Statement of Reasons re 18 Judgment. (kls,) (Entered: 06/15/2009)

06/22/2009 21 ORDER as to Doyle Randall Paroline re 13 Order. The Court modifies its

previous Order 13 and ORDERS Mr. Marsh to notify parties and the Court in every case in which "Amy" has requested restitution of this Court's June 10 Order with an appropriate cover page identifying the pendency of this action and this Court's invitation for any interested party to file a brief or statement of interest in this case in accordance with the Court's June 10 Order's briefing schedule. Signed by Judge Leonard Davis on 6/22/2009. (kls,) (Entered: 06/23/2009)

07/20/2009 27 TRIAL BRIEF by National Crime Victim Law Institute, Victim Rights Center as to Doyle Randall Paroline (Attachments: # 1 Appendix) (Cassell, Paul) (Entered: 07/20/2009)

07/20/2009 29 TRIAL BRIEF by USA as to Doyle Randall Paroline (Baldwin, William) (Entered: 07/20/2009)

07/20/2009 30 TRIAL BRIEF by The National Center for Missing and Exploited Children as to Doyle Randall Paroline (Souras, Yiota) (Entered: 07/20/2009)

08/19/2009 33 Rebuttal Response in Opposition to Request for Restitution by Doyle Randall Paroline. (Attachments: # 1 Exhibit Affidavit of Wade E. French, # 2 Exhibit Vitae of Wade E. French)(Files, F R) Modified on 8/19/2009 (kls,). (Entered: 08/19/2009)

08/20/2009 35 **Minute Entry – 8.20.09 Restitution Hearing** for proceedings held before Judge Leonard Davis:Motion Hearing as to Doyle Randall Paroline held on 8/20/2009 re 12 Request/ Motion for Restitution (Court Reporter Shea Sloan) (rlf) (Entered: 08/20/2009)

08/20/2009 36 **WAIVER** of 90-Day Restitution Determination as to Dft Doyle Randall Paroline (rlf) (Entered: 08/20/2009)

08/24/2009 37 NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Restitution Hearing Proceedings as to Doyle Randall Paroline held on 8/20/09 before Judge Leonard Davis. Court Reporter: Shea Sloan, shea_sloan@txed.uscourts.gov. 104 pages

09/04/2009 42 MOTION for Discovery *in Response to Court'* by Doyle Randall Paroline. (Attachments: # 1 Text of Proposed Order) (Files, F R) (Entered: 09/04/2009)

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09/24/2009 46 ORDER granting in part and denying in part 42 Motion for Evidentiary Materials, for the Taking of Depositions, for an Accounting, for Expert

Funds, as to Doyle Randall Paroline (1). Signed by Judge Leonard Davis on 9/24/2009. (kls,) (Entered: 09/24/2009)

10/14/2009 47 NOTICE *of Stipulation of Parties* by Doyle Randall Paroline (Files, F R) (Entered: 10/14/2009)

10/27/2009 54 RESPONSE by Amy Unknownto 45 Order on Motion for Extension of Time to File *Victim's Supplementary Brief and Evidence* (Attachments: # 1 Exhibit Victim's Request for Restitution, # 2 Exhibit Transcript of Restitution Hearing on 08-20-2009, # 3 Exhibit Excerpts from Beyond Tolerance, # 4 Exhibit Excerpts from Child Molesters: A Behavioral Analysis, # 5 Exhibit Child pornography in peer-to-peer networks, # 6 Exhibit Child Pornography Possessors Arrested in Internet-Related Crimes, # 7 Exhibit Federal Prosecution of Child Sex Exploitation Offenders, 2006, # 8 Exhibit Excerpts from Child Pornography and Sexual Exploitation of Children Online, # 9 Exhibit Child Pornographys Forgotten Victims) (Marsh, James) (Entered: 10/27/2009)

10/28/2009 56 RESPONSE by Amy Unknownto 45 Order on Motion for Extension of Time to File *Victim's Additional Evidence* (Attachments: # 1 Exhibit Snakenberg v. Hartford Casualty, # 2 Exhibit United States of America v.

John Estep, # 3 Exhibit United States of America v. Alan Hesketh, # 4 Exhibit United States of America v. David Allen Torrey, # 5 Exhibit United States of America v. Jose M. Hilario, # 6 Exhibit United States of America v. James Freeman, # 7 Exhibit United States v. Simon, # 8 Exhibit United States of America v. Paul Edward Monk, # 9 Exhibit United States of America v. Terry Zane, # 10 Exhibit United States v. Ferenci, # 11 Exhibit United States of America v. John Granato, # 12 Exhibit United States v. Arthur Weston Staples, # 13 Exhibit United States of America v. Michael Berk, # 14 Exhibit Excerpt from Response to A Reluctant Rebellion) (Marsh, James) (Entered: 10/28/2009)

10/28/2009 57 **Minute Entry – 10.28.2009 Request for Restitution** for proceedings held before Judge Leonard Davis:Restitution Hearing as to Doyle Randall Paroline held on 10/28/2009 re 12 Sealed Request for restitution (Court Reporter Shea Sloan.) (rlf,) (Entered: 10/29/2009)

12/07/2009 59 MEMORANDUM OPINION AND ORDER as to Doyle Randall Paroline, ORDER as to Doyle Randall Paroline: Having considered the parties' oral arguments and written submissions, and for the reasons explained below, the Government has not met its

		burden of proving what losses, if any, were proximately caused by Paroline's possession of Amy's two pornographic images and thus, the Request for Restitution is DENIED. Signed by Judge Leonard Davis on 12/7/2009. (kls,) (Entered: 12/07/2009)
12/17/2009	62	NOTICE OF APPEAL by Amy Unknown. Filing fee $ 455, receipt number 05400000000002285008. (Marsh, James) Modified on 1/18/2013 (tlh,). (Entered: 12/17/2009)
12/18/2009	63	ORDER granting 61 Motion to Appoint Co-Counsel. Stanley George Schneider for Doyle Randall Paroline appointed as to Doyle Randall Paroline (1). Signed by Judge Leonard Davis on 12/18/09. (mjc,) (Entered: 12/18/2009)
12/22/2009	64	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Restitution Hearing Proceedings as to Doyle Randall Paroline held on 10/28/09 before Judge Leonard Davis. Court Reporter: Shea Sloan, shea.sloan@txed.uscourts.gov. 67 pages.
01/04/2010	65	ORDER of USCA (certified copy) re 62 Notice of Appeal. The petition for writ of mandamus is denied. (ljw,) (Entered: 01/05/2010)
03/11/2010	70	AMENDED JUDGMENT as to Doyle Randall Paroline (1), Count(s) 1, Imprisonment for a term of 24

		Months; Fine Waived; $100 Special Assessment; 10 Years Supervised Release. Signed by Judge Leonard Davis on 3/11/10. (mjc,) (Entered: 03/11/2010)
03/11/2010	71	SEALED Statement of Reasons re 70 Amended Judgment. (mjc,) (Entered: 03/11/2010)
01/15/2013	76	MANDATE of USCA (certified copy) as to Doyle Randall Paroline re 62 Notice of Appeal. It is ordered and adjudged that the judgment of the District Court is vacated, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court. Issued as mandate 1/11/2013. (Attachments: # 1 Cover Letter) (mjc,) (Entered: 01/18/2013)
01/30/2013	77	Unopposed MOTION Motion to Stay by Doyle Randall Paroline. (Attachments: #1 Text of Proposed Order) (Schneider, Stanley) (Entered: 01/30/2013)
02/25/2013	79	ORDER granting 77 Motion to Stay as to Doyle Randall Paroline (1). Signed by Judge Leonard Davis on 2/25/13. (mjc,) (Entered: 02/25/2013)
06/11/2013	81	ORDER granting 80 Motion to Clarify the Appointment of Counsel as to Doyle Randall Paroline (1). F.R. "Buck" Files Jr. and Stanley G. Schneider were appointed to

represent the Defendant pursuant to the Criminal Justice Act of 1964. Signed by Judge Leonard Davis on 6/11/13. (mjc,) (Entered: 06/11/2013)

RELEVANT DOCKET ENTRIES FOR THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Date Filed	Docket Text
12/17/2009	PETITION filed by Petitioner Ms. Amy Unknown for writ of mandamus [6431948-2]
12/17/2009	MOTION filed by Petitioner Ms. Amy Unknown to waive right to a decision within 72-hours.
12/17/2009	EXHIBITS IN SUPPORT of petition for writ of mandamus [6431948-2] filed by Petitioner Ms. Amy Unknown [0941238] (SAT)
12/21/2009	RESPONSE/OPPOSITION filed by USA [6433950-1] to the petition for writ of mandamus filed by Petitioner Ms. Amy Unknown in 09-41238 [6431948-2]
12/21/2009	RESPONSE/OPPOSITION filed by Doyle Randall Paroline [6433954-1] to the petition for writ of mandamus filed by Petitioner Ms. Amy Unknown in 09-41238 [6431948-2]
12/21/2009	EXHIBITS IN SUPPORT of response/ opposition [6433950-2] filed by Respondent Doyle Randall Paroline
12/21/2009	PUBLISHED OPINION ORDER FILED. [09-41238 Affirmed] Judge: WED, Judge: JES, Judge: JLD; denying petition for writ of mandamus filed by

	Petitioner Ms. Amy Unknown (ISSUED AS & FOR THE MANDATE)
12/21/2009	MANDATE ISSUED.
12/22/2009	REVISED PUBLISHED OPINION FILED.
01/11/2010	PETITION filed by Petitioner Ms. Amy Unknown for rehearing [6445979-2].
01/11/2010	PETITION filed by Petitioner Ms. Amy Unknown for rehearing en banc [6445991-2]
01/25/2010	COURT ORDER GRANTING motion to treat mandamus petition as appellant's brief on the merits filed by Petitioner Ms. Amy Unknown [6446249-3] in 09-41238, SUBJECT TO FURTHER ORDER FROM THE MERITS PANEL; GRANTING, motion to treat mandamus petition as appellant's brief filed by Appellant Ms. Amy Unknown [6445847-3] in 09-41254, SUBJECT TO FURTHER ORDER FROM THE MERITS PANEL; GRANTING motion to consolidate case filed by Petitioner Ms. Amy Unknown [6446249-2] in 09-41238 for briefing and oral argument purposes, GRANTING motion to consolidate case filed by Appellant Ms. Amy Unknown [6445847-2] in 09-41254 for briefing and oral argument purposes. Judge(s): WED. [09-41238, 09-41254] (LBM)
01/25/2010	APPELLANT'S BRIEF FILED by Ms. Amy Unknown in 09-41238, 09-41254.

01/27/2010	OPPOSED MOTION filed by Appellee USA to dismiss the appeal [6458532-2].
02/04/2010	RESPONSE filed by Doyle Randall Paroline [6463309-1] to the motion to dismiss appeal filed by Appellee USA in 09-41254 [6458532-2] and INCORPORATED MOTION to dismiss the appeal [6463309-3].
02/12/2010	RESPONSE/OPPOSITION filed by Ms. Amy Unknown in 09-41238, 09-41254 [6468567-1] to the motion to dismiss appeal filed by Appellee USA in 09-41254 [6458532-2], motion to dismiss appeal filed by Appellee Doyle Randall Paroline in 09-41254 [6463309-3]
02/19/2010	REPLY filed by Appellee USA in 09-41254 [6472309-1] to the response/ opposition filed by Petitioner Ms. Amy Unknown, Appellant Ms. Amy Unknown in 09-41238,09-41254 [6468557-2]
06/08/2010	APPELLEE'S BRIEF FILED by Appellee USA in 09-41254, Respondent USA in 0941238
06/15/2010	APPELLEE'S BRIEF FILED by Appellee Mr. Doyle Randall Paroline
07/02/2010	APPELLANT'S REPLY BRIEF FILED by Ms. Amy Unknown in 09-41238, 09-41254.
09/30/2010	RECORD EXCERPTS FILED by Petitioner Ms. Amy Unknown in 09-41238, Appellant Ms. Amy Unknown in 09-41254.

11/01/2010	SUPPLEMENTAL AUTHORITIES (FRAP 28j) FILED by Respondent USA in 09-41238, Appellee USA in 09-41254
11/04/2010	ORAL ARGUMENT HEARD before Judges Jones, Jolly, Garza. Arguing Person Information Updated for: Paul G Cassell arguing for Petitioner Amy Unknown; Arguing Person Information Updated for: Fred Rimes Files, Jr. arguing for Respondent Doyle Randall Paroline; Arguing Person Information Updated for: Traci Lynne Kenner arguing for Respondent United States of America [09-41238, 09-41254] (SME)
11/04/2010	SUPPLEMENTAL AUTHORITIES (FRAP 28j) FILED by Respondent Mr. Doyle Randall Paroline in 09-41238, Appellee Mr. Doyle Randall Paroline in 09-41254
03/22/2011	PUBLISHED OPINION FILED. [09-41238 Reversed (GRANTED & REMANDED) 09-41254 Reversed & Remanded] Judge: EHJ, Judge: EGJ, Judge: EMG Judges EGJ and EMG concur, except inPart11, which they consider advisory. Mandate pull date is 05/13/2011; granting petition for rehearing filed by Petitioner Ms. Amy Unknown [6445979-2] in 09-41238; [6431948-2] in 09-41238; granting & remanding petition for writ of mandamus filed by Petitioner Ms. Amy

Unknown [6431948-2] in 09-41238 [09-41238, 09-41254] (RMF)

03/22/2011 JUDGMENT ENTERED AND FILED.

04/15/2011 PETITION filed by Respondent Mr. Doyle Randall Paroline in 09-41238, Appellee Mr. Doyle Randall Paroline in 09-41254 for rehearing [6790086-2].

04/15/2011 PETITION filed by Respondent Mr. Doyle Randall Paroline in 09-41238, Appellee Mr. Doyle Randall Paroline in 09-41254 for rehearing en banc [6790103-2].

05/09/2011 COURT DIRECTIVE ISSUED requesting a response to the petition for rehearing en banc.

05/10/2011 COURT DIRECTIVE ISSUED requesting a response from the governement to the petition for rehearing en bancResponse/Opposition due on 05/20/2011.

05/19/2011 RESPONSE/OPPOSITION filed by Ms. Amy Unknown in 09-41238, 09-41254 [6816611-1] to the petition for rehearing en banc filed by Respondent Mr. Doyle Randall Paroline, Appellee Mr. Doyle Randall Paroline in 09-41238, 09-41254 [6790103-2]

05/27/2011 REPLY filed by Respondent Mr. Doyle Randall Paroline in 09-41238, Appellee Mr. Doyle Randall Paroline in 09-41254 [6822436-1] to the response/opposition

filed by Petitioner Ms. Amy Unknown in 09-41238 [6816611-2].

06/27/2011 RESPONSE/OPPOSITION filed by USA in 0941238, 09-41254 [6845570-1] to the petition for rehearing en banc filed by Respondent Mr. Doyle Randall Paroline, Appellee Mr. Doyle Randall Paroline in 09-41238, 09-41254 [6790103-2]

01/25/2012 COURT ORDER granting petition for rehearing en banc filed by Respondent Mr. Doyle Randall Paroline, Appellee Mr. Doyle Randall Paroline [6790103-2]

02/08/2012 LETTER filed by Petitioner Ms. Amy Unknown in 09-41238, Appellant Ms. Amy Unknown in 09-41254 This letter seeks clarification of the Court's letter to counsel dated February 6, 2012.

02/09/2012 LETTER filed by Respondent USA in 09-41238, Appellee USA in 0941254 referencing letter filed by Petitioner Ms. Amy Unknown, Appellant Ms. Amy Unknown in 09-41238, 09-41254 [7012223-2]

02/24/2012 APPELLANT'S SUPPLEMENTAL BRIEF FILED by Ms. Amy Unknown in 09-41238, 09-41254

03/26/2012 APPELLEE'S SUPPLEMENTAL BRIEF FILED by USA in 09-41238, 09-41254

03/26/2012 APPELLEE'S SUPPLEMENTAL BRIEF FILED by Mr. Doyle Randall Paroline in 09-41238, 09-41254

03/27/2012 LETTER filed by Respondent USA in 09-41238, Appellee USA in 09-41254 on it's

views on both the allocation of argument time, and the order of the argument presentation.

03/28/2012 LETTER filed by Respondent Mr. Doyle Randall Paroline in 09-41238, Appellee Mr. Doyle Randall Paroline in 09-41254 referencing letter filed by Respondent USA, Appellee USA in 09-41238, 09-41254 [7048469-2].

03/28/2012 LETTER filed by Petitioner Ms. Amy Unknown in 09-41238, Appellant Ms. Amy Unknown in 09-41254 referencing letter filed by Respondent USA, Appellee USA in 09-41238, 09-41254 [7048469-2].

04/20/2012 OPPOSED MOTION filed by Petitioner Ms. Amy Unknown in 09-41238, Appellant Ms. Amy Unknown in 09-41254 to strike appellee supplement brief filed by Respondent USA, Appellee USA in 09-41238, 09-41254 [7047841-2] [7069044-2].

04/23/2012 RESPONSE/OPPOSITION filed by USA in 09-41238, 09-41254 [7069312-1] to the motion to strike brief filed by Petitioner Ms. Amy Unknown, Appellant Ms. Amy Unknown in 09-41238, 09-41254 [7069044-2]

04/23/2012 COURT ORDER filed carrying with the case petitioner's motion to strike a portion of respondent's brief filed by Petitioner Ms. Amy Unknown, Appellant Ms. Amy Unknown [7069044-2] Judge(s): EHJ. [09-41238, 09-41254] (SMH)

04/26/2012 REPLY filed by Petitioner Ms. Amy Unknown in 09-41238, Appellant Ms. Amy Unknown in 09-41254 [7073910-1] to the response/opposition filed by Respondent USA, Appellee USA in 09-41238, 09-41254 [7069312-2], to the motion to strike brief filed by Petitioner Ms. Amy Unknown, Appellant Ms. Amy Unknown in 09-41238, 09-41254 [7069044-2].

04/27/2012 LETTER filed by Respondent USA in 09-41238, Appellee USA in 09-41254 addressing a post-briefing factual dispute identified by Amy's counsel.

05/02/2012 SUPPLEMENTAL AUTHORITIES (FRAP 28j) FILED by Petitioner Ms. Amy Unknown in 09-41238, Appellant Ms. Amy Unknown in 09-41254

05/03/2012 EN BANC ORAL ARGUMENT HEARD Jones, King, Jolly, Davis, Smith, Garza, Stewart, Dennis, Clement, Prado, Owen, Elrod, Southwick, Haynes, Graves En Banc;. Arguing Person Information Updated for: Paul G. Cassell arguing for Petitioner/Appellant Amy Unknown; Arguing Person Information Updated for: Michael A. Rotker arguing for Respondent/Appellee United States of America; Arguing Person Information Updated for: Stanley G. Schneider arguing for Respondent/Appellee Doyle Randall Paroline [09-41238, 09-41254] (SMH)

07/03/2012 LETTER filed by Respondent USA in 09-41238, Appellee USA in 09-41254 referencing letter filed by Respondent USA, Appellee USA in 09-41238, 09-41254

07/03/2012 LETTER filed by Respondent USA in 09-41238, Appellee USA in 09-41254 referencing letter filed by Respondent USA, Appellee USA in 09-41238, 09-41254

07/03/2012 LETTER filed by Respondent USA in 09-41238, Appellee USA in 09-41254 referencing letter filed by Respondent USA, Appellee USA in 09-41238, 09-41254 [7125831-2].

07/05/2012 RESPONSE/OPPOSITION filed by Ms. Amy Unknown in 09-41238, 09-41254 [7127584-1] to the letter filed by Respondent USA, Appellee USA in 09-41238, 09-41254 [7126250-2]

10/01/2012 PUBLISHED OPINION FILED. [09-41238 Vacated & Remanded 09-41254 Vacated and Remanded] Judge: EMG, Judge: JLD concurs in part in the judgment, Judge: WED concurs in part and dissents in part joined by CDK, JES, & JEG, Judge: LHS dissents. Mandate pull date is 11/26/2012; denying motion to strike brief filed by Petitioner Ms. Amy Unknown, Appellant Ms. Amy Unknown [7069044-2]; denying motion to file brief in excess of word count filed by Appellee Mr. Doyle Randall Paroline [7047403-2] in 0941254, denying motion to file brief in excess of word count filed

	by Appellee USA [7038235-2] in 09-41254 (ALSO FILED IN 09-31215) [09-41238, 09-41254] (RMF)
10/01/2012	JUDGMENT ENTERED AND FILED. [09-41238, 09-41254] (RMF)
10/01/2012	REVISED PUBLISHED OPINION FILED. [7193980-2] [09-41238, 09-41254] (RMF)
11/19/2012	OPINION WITHDRAWN. [7194491-2], [7193980-2]Mandate pull date canceled. [09-41238, 09-41254] (JMA)
11/19/2012	PUBLISHED OPINION FILED. [09-41238 Reversed (Granted) 09-41254 Vacated and Remanded] Judge: EMG, Judge: JLD, Judge: WED, Judge: LHS Mandate pull date is 01/10/2013 [09-41238, 09-41254] (JMA)
11/19/2012	JUDGMENT ENTERED AND FILED. [09-41238, 09-41254] (JMA)
01/11/2013	MANDATE ISSUED. Mandate pull date satisfied. [09-41238, 09-41254] (CAG)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

From: Becky Smith
To: Victim Notification System
Subject: US Department of Justice Victim Notification System
Date: Friday, April 17, 2009 11:38:19 AM

DO NOT REPLY TO THIS EMAIL.

U.S. Department of Justice
United States Attorney's Office
Eastern District of Texas in Tyler
110 N. College
Ste. 700
Tyler, TX 75702
Phone: 18008043547
Fax: (903) 590-1439

April 17, 2009

James Marsh
14525 S.W. Milliken Way
Beaverton, OR 97005

RE: United States v. Defendant(s) Doyle Randall Peroline Case Number 2008R00609 and Court Docket Number 6:08CR61

Dear James Marsh:

The United States Department of Justice believes it is important to keep victims of federal crime informed of court proceedings. You have been identified to receive notifications for [redacted] This notice provides information about the above-referenced criminal case.

Charges have been filed against defendant(s) Doyle Randall Peroline. The lead prosecutor for this case is Bill Baldwin. The main charge is categorized as Project Safe Childhood.

The Crime Victims' Rights Act gives victims of criminal offenses in Federal court the following rights: (1) The right to be reasonably protected from the accused; (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime, or of any release or escape of the accused; (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding; (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding; (5) The reasonable right to confer with the attorney for the Government in the case; (6) The right to full and timely restitution as provided in law; (7) The right to proceedings free from unreasonable delay; and (8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

We will make our best efforts to ensure you are provided the rights described above. It is important to keep in mind that the defendant(s) are presumed innocent until proven guilty and that presumption requires both the Court and our office to take certain steps to ensure that justice is served. While our office

cannot act as your attorney or provide you with legal advice, you can seek the advice of an attorney with respect to these rights or other related legal matters.

On January 12, 2009, defendant Doyle Randall Peroline pled guilty to the charges listed below. Any remaining counts will be disposed of at the time of sentencing. As a result of the guilty plea, there will be no trial involving this defendant.

Number of Charges	Description of Charges	Disposition
1	Material involving sexual exploitation of Minors	Guilty

The sentencing hearing for defendant(s), Doyle Randall Paroline, has been set for May 27, 2009, 11:00 AM at U.S. Federal Courthouse, 211 W. Ferguson, Tyler, TX before Judge Leonard E. Davis. You are welcome to attend this proceeding; however, unless you have received a subpoena, your attendance is not required by the Court. If you plan on attending, please check with the VNS Call Center to verify the sentencing date and time. Should you wish to speak at the sentencing or want to check for the most current information on the date/time of this event please call our office a day or two before the scheduled hearing.

A United States Probation Officer prepares a report for the Court and may contact you to discuss the impact the crime had on you financially, physically, and/or emotionally. If you are contacted, please make

every effort to provide accurate and detailed information.

The Victim Notification System (VNS) is designed to provide you with information regarding the case as it proceeds through the criminal justice system. You may obtain current information about this case on the VNS Web site at https://www.notify.usdoj.gov or from the VNS Call Center at 1-866-DOJ-4YOU (1-866-365-4968) (TDD/TTY: 1-866-228-4619) (International: 1-502-213-2767). In addition, you may use the Call Center or Internet to update your contact information and/or change your decision about participation in the notification program. If you update your information to include a current email address, VNS will send information to that address. In order to continue to receive notifications, it is your responsibility to keep your contact information current.

You will use your Victim Identification Number (VIN) [redacted] and Personal Identification Number (PIN) [redacted] anytime you contact the Call Center and the first time you log on to the VNS web site. In addition, the first time you access the VNS Internet site, you will be prompted to enter your last name (or business name) as currently contained in VNS. The name you should enter is [redacted]

Remember, VNS is an automated system and cannot answer questions. If you have other questions which involve this matter, please contact this office at the number listed above.

Sincerely,

Rebecca A. Gregory
United States Attorney

Becky Smith
Victim Witness Coordinator

If you do not want to receive email notifications from the Victim Notification System (VNS) or wish to no longer participate in the Department of Justice victim notification program, please log into the VNS Web site at https://www.notify.usdoj.gov. To stop receiving email notifications or change your email address select My Information and either remove your email address or provide a new address and click the "update" button. If you no longer wish to receive notifications in your case or access the VNS Web site and toll free telephone service, select Stop Receiving Notifications and follow the instructions on the screen.

If you believe you have received this email in error, please contact the office listed at top of the email message.

Please note, if this is the first notification you have received from VNS you will need to wait 4-8 hours from receipt of this email before you can login to the VNS Internet site (http://www.notify.usdoj.gov). In addition, it will also be 4-8 hours before any documents which may have been uploaded to VNS as part of this notification will available under the "Documents/Links" section on the Web page.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

THE MARSH LAW FIRM PLLC

PO Box 4668 #65135

New York, NewYork 10163-4668

Phone (212) 372-3030/ Fax (914) 206-3998/
VNS@MarshLaw.net

May 1, 2009

Ms. Becky Smith
Victim Witness Coordinator
United States Attorney's Office
110 N College Ave Ste 700
Tyler, TX 75702-7237

Re: ***United States v. Doyle Randall Paroline***
Case Number 2008R00609
Court Docket Number 6:08CR61

Dear Ms. Smith,

I am the attorney for Amy, the victim in the Misty child pornography series. Amy is hereby requesting restitution in accordance with the Mandatory Restitution for Sex Crimes section of the Violence Against Women Act of 1994 [VAWA], codified at 18 U.S.C. 2259, from every criminal defendant who receives, possesses or distributes her images.

On February 23, 2009, a federal district court judge in Connecticut awarded Amy restitution in a criminal child pornography receipt and distribution case. This was the first time a victim of child pornography obtained restitution from a criminal defendant

who was not directly involved in producing the pornography depicting the victim.

The VAWA provisions require each defendant to pay Amy the "full amount" of her losses. Under the Act, the term "full amount of the victim's losses" includes any costs incurred for:

(A) medical services relating to physical, psychiatric, or psychological care;

(B) physical and occupational therapy or rehabilitation;

(C) necessary transportation, temporary housing, and child care expenses;

(D) lost income;

(E) attorneys' fees, as well as other costs incurred; and

(F) any other losses suffered by the victim as a proximate result of the offense.

This list is not exclusive since the primary goal of restitution under 18 U.S.C. 2259 is to award the full amount of the victim's losses regardless of how those losses are categorized.

The attached documents are incorporated into this request:

1. Victim Impact Statement of Amy – The Victim in the Misty Series;

2. Report of Psychological Consultation by Joyanna Silberg, Ph.D. dated November 21, 2008;

3. Letter Calculating the Value of Certain Losses by the Smith Economics Group, Ltd. dated September 15, 2008;

Introduction

When she was eight and nine years old, Amy was repeatedly raped and sexually exploited in order to produce child pornography.[1] Her abuse images depict rape, cunnilingus, fellatio and digital penetration. Amy was also forced to actively participate in her exploitation and abuse by performing sex acts over the telephone and computer for other pedophiles; being asked to solicit friends to join her in sex acts; and being taken into the woods to meet other pedophiles. Most if not all of this activity was for the purpose of producing the child pornography possessed and distributed by the Defendant in this case.

According to Amy's forensic psychologist, Dr. Joyanna Silberg, Amy faces a long and difficult course of treatment for post traumatic stress disorder:

---

[1] "In the context of children . . . there can be no question of consent, and use of the word pornography may effectively allow us to distance ourselves from the material's true nature. A preferred term is abuse images and this term is increasingly gaining acceptance among professionals working in this area. Using the term abuse images accurately describes the process and product of taking indecent and sexualized pictures of children, and its use is, on the whole, to be supported." Sharon W. Cooper, et. al., *Medical Legal; & Social Science Aspect of Child Sexual Exploitation* p. 258 (2005).

These post traumatic symptoms and effects of sexual abuse are more resistant to treatment than those that would normally follow a time limited trauma, as her awareness of the continued existence of the pictures and their criminal use in a widespread way leads to an activation in these symptoms. . . .

. . . As noted by Klain, Davies and Hicks (2001) "Child victims of pornography face a lifetime of victimization because the pornography can be distributed indefinitely." . . .

Feelings of shame and humiliation are some of the worst affective reactions to treat in victims of sexual abuse. These feelings of shame and humiliation are multiplied exponentially for victims of Internet child pornography. Anonymity is something we offer victims of sexual crimes with acknowledgment that they deserve this protection of privacy. Yet, knowing one's image is out there at all times is an invasion of privacy of the highest degree which makes the victim feel known, revealed and publicly shamed, rather than anonymous. . . .

The ongoing awareness that the pictures are out there interferes significantly with the therapeutic resolution of these problems, as she lives in an enduring state of feeling that she can never really escape or get away from abuse.

For these reasons, the re-victimization of Amy through the trading of her images on the Internet is the source of enduring trauma

> that will have lasting effects on her and the symptoms she displays are particularly resistant to standard treatment for post-traumatic stress and the effects of sexual abuse.
>
> . . . It is expected that she will continue to struggle with the enduring effects of these traumatic experiences as described above over her lifetime. She will require weekly therapy, and it is likely there will be periods where more intensive inpatient treatment or rehabilitation services will be required over the course of her lifetime.

Silberg, *Psychological Consultation* pp. 8-10.

Scientific research and established legal precedence support Dr. Silberg's conclusions. Dr. Mimi Halper Silbert discovered that the long-term effects on child pornography victims of being photographed were more debilitating than any short-term or medium-term effects and that these effects are compounded when children are involved in more than one form of sexual exploitation. These ill-effects may be exacerbated by the knowledge that others may see or distribute the images. Dolf Zillmann & Jennings Bryant, *Pornography: Research Advances and Policy Considerations* p. 215 (1989).

In the landmark case of *New York v. Ferber*, 458 U.S. 747 (1982), the United States Supreme Court found that:

> [t]he use of children as subjects of pornographic materials is very harmful to both the

> children and the society as a whole. It has been found that sexually exploited children are unable to develop healthy affectionate relationships in later life, have sexual dysfunctions, and have a tendency to become sexual abusers as adults. . . .
>
> Pornography poses an even greater threat to the child victim than does sexual abuse or prostitution. Because the child's actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place. A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography. . . . It is the fear of exposure and the tension of keeping the act secret that seem to have the most profound emotional repercussions.

Id. at pp. 758-760 nn. 9, 10. See also *U.S. v. Sherman*, 268 F.3d 539 (7th Cir. 2001) (the children depicted in the pornography suffer a direct and primary emotional harm when another person possesses, receives or distributes the material); *U.S. v. Knox*, 32 F.3d 733 (3rd Cir. 1994) (child pornography is an affront to the dignity and privacy of the child and an exploitation of the child's vulnerability); *U.S. v. Andersson*, 803 F.2d 903 (7th Cir. 1986) (the harm inflicted on these children is two-fold: the sexual abuse when the film or photograph is initially produced . . . and the harm continues when these photographs and films are distributed).

"Whatever the complexities, it is quite clear that the production of abusive images of children feeds, sustains, and generates sexual exploitation of children. . . . There are no good and bad offenders with respect to the trade of abuse images of children." Sharon W. Cooper, et. al., *Medical, Legal, & Social Science Aspect of Child Sexual Exploitation* p. 273 (2005).[2]

Amy is the Victim of the Defendant's Crimes

Child pornography is largely distributed by loosely organized networks of anonymous pedophiles and members of other deviant subcultures utilizing a variety of Internet technologies. The individuals who trade and receive child pornography do not know each other which enables them to conduct their illegal activities with impunity and little risk of discovery. Given the nature of the child pornography trade, these networks comprise a concerted and coordinated group effort to perpetrate the production and distribution of child pornography worldwide and the associated sexual victimization of children.[3] The Defendant in

---

[2] Dr. Cooper has been retained by Amy as a consulting expert.

[3] A recently reported study of individuals incarcerated for possession, receipt and distribution of child pornography found that these offenders were significantly more likely than not to have sexually abused a child via a hands-on act. The study's authors suggest that online criminal investigations, while targeting so-called "Internet sex offenders," likely have resulted in the apprehension of concomitant child molesters. Upon being

(Continued on following page)

this case was one such member of this group. See Philip Jenkins, *Beyond Tolerance: Child Pornography on the Internet.* New York: NYU Press, 2001.

The United States courts of appeal have consistently and repeatedly held that the primary victims of child pornography possession, receipt, distribution and production are the children depicted in the pornographic materials.

In *United States v. Ketcham*, 80 F.3d 789 (3rd Cir. 1996), the Third Circuit Court of Appeals held that "the primary victims that Congress had in mind when it enacted 18 U.S.C. 2252(a) were the children depicted in pornographic materials." Similarly in

---

discovered these offenders tend to minimize their behavior. They may attribute their search for child pornography to "curiosity" or a similar benign motivation. They may "accept responsibility" only for those behaviors that are already known to law enforcement, but hide any contact sexual crimes to avoid prosecution for these offenses, or to avoid the shame and humiliation that would result from revealing their deviance to family, friends, and community. Only later do the majority of sex offenders who enter treatment acknowledge that they were not, as they initially claimed, merely interested in sexual images involving children; they were, and are, sexually aroused by children. Further, as prior research and the current findings suggest, it appears that the manifestations of their deviant sexual arousal was not limited to fantasy. Rather, when an opportunity arose either incidentally or as a result of planned predatory efforts many offenders molested or raped children and engaged in a variety of other sexually deviant behaviors. Michael L. Bourke & Andres E. Hernandez, *The 'Butner Study' Redux: A Report of the Incidence of Hands-on Child Victimization by Child Pornography Offenders.* Journal of Family Violence (2009) 24:183-191.

United States v. Hibbler, 159 F.3d 233 (6th Cir. 1998), the Sixth Circuit Court of Appeals concluded that "the child pornographer, quite simply, directly victimizes the children pictured in such materials. . . . It is the children depicted in the child pornography distributed and possessed by defendant who are the primary victims of the crimes of which he was convicted."

In *United States v. Davis*, 204 F.3d 1064 (11th Cir. 1999), the Eleventh Circuit Court of Appeals explained that "the harm resulting from possession of child pornography occurs when one sustains a market for such pictures. . . . Therefore, it is not necessary for one to derive any benefit from the child pornography or actively solicit the pornography, provided one's actions play a role in the distribution network."

In *United States v. Boos*, 127 F.3d 1207 (9th Cir. 1997), the Ninth Circuit Court of Appeals noted that "the harm caused by the distribution of child pornography is concentrated. It is visited upon a single individual or discrete group of individuals, namely, the child or children used in the production of the pornographic material." The Court reasoned:

> it seems to us scarcely debatable that the children depicted – many as young as 5 years old – were the primary "victims" of Boos's criminal conduct . . . After all, it was the children depicted . . . who were "injured" (both physically and psychologically) as a result of Boos's patronage of the porn industry,

> who were "sacrificed" to satisfy Boos's curiosities, who were "subjected" to the cruelest form of "oppression, hardship, [and] mistreatment" at the hands of pornography producers and photographers, and whose lives were quite possibly "destroyed" in the process.

Id. at p. 1210.

The *Boos* court also "categorically reject[ed] Boos's attempt to draw a fine-line distinction between the production of child pornography, which he concedes primarily injures the children involved, and the distribution of that pornography, which he claims does not have the same injurious effect." *Id.* at 1211 n. 1.

In *United States v. Norris*, 159 F.3d 926 (5th Cir. 1998), the defendant argued that "when he committed the crime of receiving child pornography, the children depicted were not 'victimized' by that act and therefore were not 'victims' for sentencing purposes. Under this theory the victimization of the children occurred at the time the pornographic images were produced. Therefore, according to Norris, the criminal act of simply receiving child pornography is a victimless crime, and the children depicted in the child pornography can only be victims of the crime of receiving child pornography in an indirect or secondary sense." *Id.* at p. 929.

The *Norris* court, like the *Boos* court, unequivocally rejected this reasoning finding that this was an

"unrealistically narrow view" of the scope of harms experienced by child pornography victims, surmising that "[u]nfortunately, the victimization of the children involved does not end when the pornographer's camera is put away." *Id.* The court found that the consumer, or end recipient, of child pornography cause the children depicted in those materials to suffer in at least three ways:

> First, the simple fact that the images have been disseminated perpetuates the abuse initiated by the producer of the materials. "[T]he materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation." . . . The consumer who "merely" or "passively" receives or possesses child pornography directly contributes to this continuing victimization.
>
> Second, the mere existence of child pornography represents an invasion of the privacy of the child depicted. Both the Supreme Court and Congress have explicitly acknowledged that the child victims of child pornography are directly harmed by this despicable intrusion on the lives of the young and the innocent. The recipient of child pornography obviously perpetuates the existence of the images received, and therefore the recipient may be considered to be invading the privacy of the children depicted, directly victimizing these children.
>
> Third, the consumer of child pornography instigates the original production of child

> pornography by providing an economic motive for creating and distributing the materials. As Congress put it in explicit factual findings: "[T]he existence of and traffic in child pornographic images . . . inflames the desires of child molesters, pedophiles, and child pornographers, thereby increasing the creation and distribution of child pornography and the sexual abuse and exploitation of actual children who are victimized as a result of the existence and use of these materials[.]"

Id. at pp. 929-930 (internal citations removed).

The *Norris* court recognized that:

> there is no sense in distinguishing . . . between the producers and the consumers of child pornography. Neither could exist without the other. The consumers of child pornography therefore victimize the children depicted in child pornography by enabling and supporting the continued production of child pornography, which entails continuous direct abuse and victimization of child subjects.

Id. at p. 930.

The court concluded that "the victimization of a child depicted in pornographic materials flows just as directly from the crime of knowingly receiving child pornography as it does from the arguably more culpable offenses of producing or distributing child pornography." *Id.*

Like the defendants in *Norris* and *Boos*, the defendant in *United States v. Tillmon*, 195 F.3d 640 (11th Cir. 1999) argued that "while the minor depicted was victimized when the photographs were taken, the interstate transportation of the photograph does not further harm that child. The Eleventh Circuit Court of Appeals rejected this argument distinguishing between child pornography production and child pornography distribution:

> Although an argument can be made that the production of child pornography may be more immediately harmful to the child involved, the dissemination of that material certainly exacerbates that harm, not only by constituting a continuing invasion of privacy but by providing the very market that led to the creation of the images in the first place. Thus, the children depicted remain the primary victims not only when the pictures are taken or purchased, but also when they are subsequently transported or distributed from one person to another.

Id. at p. 644. The Court concluded that "the primary identifiable victim of the transportation of child pornography is the minor depicted in the image. *Id.* at p. 645.

Amy is Entitled to the Full Amount of her Losses as Restitution

As the "primary identifiable victim" in this case, Amy is entitled to criminal restitution. The primary

goal of restitution under the Mandatory Restitution for Sex Crimes section of the Violence Against Women's Act of 1994 [18 U.S.C. 2259] is to award the full amount of the victim's losses regardless of how those losses are categorized.

The district court has substantial discretion over the entire process leading to a restitution order and in determining the amount of restitution. So long as the basis for reasonable approximation of a victim's loss is at hand, difficulties in achieving exact measurements will not preclude the district court from ordering restitution. *United States v. Savoie*, 985 F.2d 612 (1st Cir. 1993).

In *United States v. Julian*, 242 F.3d 1245 (10th Cir. 2001), the Tenth Circuit Court of Appeals reviewed 18 U.S.C. 2259 and its application in child pornography cases:

> We note that § 2259 and the other two mandatory restitution statutes associated with violence against women and children which were adopted at the same time, *see* 18 U.S.C. §§ 2248 & 2264, **are much broader than § 3663A** [the Mandatory Victims Restitution Act or MVRA] . . . . these three statutes use the terms "full amount of the victim's losses" for "any costs incurred" for physical, psychiatric, or psychological care, and also include restitution for "any other losses suffered by the victim as a proximate result of the offense."

Id. at p. 1247 (emphasis added). The court found that the legislative history of the VAWA statutes justified imposing mandatory restitution for psychological counseling:

> Congress was well aware that children victimized by sexual abuse often do not recover quickly from their injuries. Indeed, the legislative history of the amended statutes prohibiting the use of children in pornography cites and quotes broadly from the landmark United States Supreme Court case of *New York v. Ferber*, 458 U.S. 747 (1982). In *Ferber*, the court extensively discussed the long-term serious physiological, emotional, and mental difficulties of children who have been sexually exploited:
>
> The use of children as subjects of pornographic materials is very harmful to both the children and the society as a whole. It has been found that sexually exploited children are unable to develop healthy affectionate relationships in later life, have sexual dysfunctions, and have a tendency to become sexual abusers as adults.
>
> . . . .
>
> Pornography poses an even greater threat to the child victim than does sexual abuse or prostitution. Because the child's actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place. A child who has posed for a camera must go through life

> knowing that the recording is circulating within the mass distribution system for child pornography. . . . It is the fear of exposure and the tension of keeping the act secret that seem to have the most profound emotional repercussions.
>
> *Ferber*, 458 U.S. at 758-60 nn. 9, 10.

Id. The *Julian* court concluded that "in discussing the rationale behind the mandatory restitution statutes, Congress noted the goal of criminal restitution: to ensure that the wrongdoer is required to the degree possible to restore the victim to his or her prior state of well being." *Id.*

In *United States v. Laney*, 189 F.3d 954 (9th Cir. 1999), the Ninth Circuit Court of Appeals explained that "the language of the relevant statutes shows that Congress intended to allow district courts to include future counseling expenses in the amount of restitution under section 2259. Section 2259 is phrased in generous terms, in order to compensate the victims of sexual abuse for the care required to address the long term effects of their abuse. . . . Congress was well aware that children victimized by sexual abuse often do not recover quickly from their injuries." *Id.* at p. 966.

The court concluded that as long as the district court estimates the amounts that victims will spend on future counseling with reasonable certainty in accordance with the procedures set forth in 18 U.S.C.

3664, an award of restitution for future counseling expenses will be upheld.

In *United States v. Whitedirt*, 216 F.3d 1085, 2000 WL 377778 (9th Cir. 2000), the Ninth Circuit Court of Appeals recognized that "a court may order mandatory restitution for amounts that victims have not yet spent." In a later case, *United States v. McKay*, 242 F.3d 384, 2000 WL 1517159 (9th Cir. 2000), the Ninth Circuit held that a district court may order restitution for the future counseling of a sexual abuse victim even though the costs of counseling have not yet been incurred and even when the victim is not already in therapy.

Determining Mandatory Restitution

In awarding $309,280 in mandatory restitution, the court in *United States v. Danser*, 270 F.3d 451 (7th Cir. 2001) explained how such an amount is properly determined:

> In support of an award of this figure, the government, through a licensed actuary, determined that Karen Doe's life should last an additional 75 years. The government then multiplied the present costs of Karen's weekly [therapy] sessions ($78 per session) by her actuarially determined life expectancy to come up with $304,200.

Id. at p. 453 n. 1. The *Danser* court found that "in enacting section 2259, it is clear that Congress intended to provide victims of sexual abuse with

expansive relief for the full amount of . . . [their] losses suffered as a result of abuse. Congress chose unambiguously to use unqualified language in prescribing full restitution for victims." *Id.* at p. 455.

The district court has broad discretion in awarding restitution for "any other losses suffered by the victim as a proximate result of the offense." In *U.S. v. Estep*, 378 F.Supp.2d 763 n. 4 (E.D.Ky. 2005) the court awarded attorney's fees to the mother of one child victim for divorce proceedings against the perpetrator, rent payments and transportation expenses, in addition to past and future treatment and counseling costs. The court also awarded attorney's fees and costs for the victims' attorney who filed a civil case on their behalf.

In *United States v. Doe*, 488 F.3d 1154 (9th Cir. 2007), the Ninth Circuit Court of Appeals upheld an award of restitution for trauma counseling and psychological care, case review by a social worker, quarterly medical check-ups, vocational training, formal schooling, and a management fee to a social services organization to coordinate services for numerous child victims.

The VAWA statute's use of the broad term "lost income" is distinct from other restitution provisions which limit recovery to "lost income . . . incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense" 18 U.S.C. 3663A(b)(4), or "lost income . . . related to participation in the investigation

or prosecution of the offense or attendance at proceedings related to the offense" 18 U.S.C. 3663(b)(4).

In 18 U.S.C. 3663A(b)(2)(c), which applies to an offense resulting in bodily injury to a victim, Congress provided for reimbursement for "income lost by such victim as a result of such offense." See *United States v. Oslund*, 453 F.3d 1048, 1062 (8th Cir. 2006) (when an offense causes bodily harm to a victim, restitution must be ordered for medical or psychological treatment, costs of therapy and rehabilitation, and 'income lost by such victim as a result of such offense'); *U.S. v. Bedonie*, 317 F. Supp. 2d 1285 (D. Utah 2004) (there is no distinction between past and future income as both are lost "as a result of" the offense; in cases involving crimes of violence courts are required to award restitution for both past and future lost income).

In *U.S. v. Serawop*, 505 F3d 1112 (10th Cir. 2007), the Tenth Circuit Court of Appeal held that "any victim suffering bodily injury or death necessarily incurs the income lost only after the injury, i.e. in the future, as a consequence of the defendant's violent act. Moreover, the term "lost earnings," which is similar to "income lost," is defined by Black's Law Dictionary to include future earnings:

> 'lost earnings. Wages, salary, or other income that a person could have earned if he or she had not lost a job, suffered a disabling injury, or died. Lost earnings are typically awarded as damages in personal-injury and wrongful-termination cases. There can be past lost

> earnings and future lost earnings. Both are subsets of this category, though legal writers sometimes loosely use future earnings as a synonym for lost earnings. Cf. LOST EARNING CAPACITY: BLACK'S LAW DICTIONARY 526 (8th ed. 2004)"

Id. at p. 1121.

The Mandatory Victims Restitution Act of 1996, which amended and restructured several parts of the Mandatory Restitution for Sex Crimes section of VAWA, highlighted the importance of "emotional damages" as an essential component of restitution for victims of child pornography. Senate Report 104-179 emphasized that "no change is made to the scope of restitution required under the VAWA provisions, including the availability of emotional damages." Such damages are also known as noneconomic compensatory damages and includes damages for what is commonly called "emotional distress."

Clearly, a victim's emotional distress is a foreseeable and proximate result of violating the federal child pornography laws. In 1946, the United States Supreme Court held in *Bell v. Hood*, 327 U.S. 678 (1946) that "federal courts may use any available remedy to make good the wrong done." Emotional damages are plainly a form of compensatory damages designed to "make good the wrong done" and fall within the scope of the "full amount of the victim's losses" as well as "losses suffered by the victim as a proximate result of the offense" allowed by the VAWA provisions.

In requiring that a victim recover the "full amount" of her losses, Congress also imposed joint and several liability on defendants. In *United States v. Erickson*, 83 Fed.Appx. 997 (10th Cir. 2003), the defendant argued that his restitution order was illegal because it included losses attributable to other defendants. The Tenth Circuit Court of Appeals disagreed finding that the statute under which the defendant received his restitution sentence, 18 U.S.C. 3664(h), states that "[i]f the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution."

The *Erickson* court found that "the severe, collaborative abuse of this child was cumulative in effect and could not be apportioned to individual perpetrators of crimes against her." Concerning the defendant's crimes, the court of appeals agreed with the district court that "it is no defense for this defendant to say there were other partners; that there were other people who are complicit." *Id.* at p. 1000.

Like the victim in *Erickson*, Amy is also a victim who has experienced "severe, collaborative abuse" due to the widespread and almost unlimited distribution of her child pornography images by individuals including the Defendant in this case. For Amy, the fact that hundreds of criminal defendants have and continue to victimize her is neither a bar to recovery nor a basis for reducing recovery since "if the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each

defendant liable for payment of the full amount of restitution." 18 U.S.C. 3664(h). According to Amy's forensic psychologist, Dr. Joyanna Silberg, it is precisely because her images are so highly sought, traded and re-distributed that Amy's psychological injuries are so lasting and severe and difficult to treat.

The doctrine of joint and several liability reflected in 18 U.S.C. 3664 has a long history in the civil law. It is especially applicable in cases involving the distribution and possession of child pornography since, as the Supreme Court recognized in *Ferber,* "[t]he victim's knowledge of publication of the visual material increases the emotional and psychic harm suffered by the child. . . . Thus, distribution of the material violates the individual interest in avoiding disclosure of personal matters. . . . When such performances are recorded and distributed, the child's privacy interests are also invaded." *Ferber*, 458 U.S. at 758-760 nn. 9, 10.

As William L. Prosser recognized in his singular Handbook of the Law of Torts, when "there is a joint enterprise, and a mutual agency, so that the act of one is the act of all . . . liability for all that is done must be visited upon each. It follows that there is no logical basis upon which the jury may be permitted to apportion the damages." Wiliam L. Prosser, *Torts* p. 315 (4th ed. 1971).

The defendant in *United States v. Crandon*, 173 F.3d 122 (3rd Cir. 1999) pled guilty to one count of

receiving child pornography. After considering the victim's unrebutted evidence, the Third Circuit Court of Appeals held that "the statute requires the court to order restitution for the full amount of the victim's losses. There is nothing in the statute that provides for a proportionality analysis." *Id.* at p. 126.

The illicit trade in child pornography is a joint enterprise, albeit a sometimes large and amorphous one. Although the Defendant did not produce Amy's child pornography images, he was part of the "joint enterprise and mutual agency" which received, possessed and distributed her images to ever more willing and eager consumers. It is the scale of this publication of Amy's abuse images and the resulting invasion of her privacy interests which has and will cause the greatest ongoing harm during her lifetime. Each possession and each distribution of each image all combine to what Prosser calls a "single indivisible result."

> Certain results, by their very nature, are obviously incapable of any logical, reasonable, or practical division. Death is such a result, and so is a broken leg or any single wound, the destruction of a house by fire, or the sinking of a barge. No ingenuity can suggest anything more than a purely arbitrary apportionment of such harm. Where two or more causes combine to produce such a single result, incapable of any logical division, each may be a substantial factor in bringing about the loss, and if so, each must be charged with all of it. . . .

> Such entire liability is imposed both where some of the causes are innocent and where two or more of the causes are culpable. It is imposed where either cause would have been sufficient in itself to bring about a result and also where both were essential to the injury. It is not necessary that the misconduct of two defendants be simultaneous. One defendant may create a situation upon which the other may act later to cause the damage. . . . Liability in such case is not a matter of causation, but of the effect of the intervening agency upon culpability. If a defendant is liable at all, he will be liable for all the damage caused.

Prosser, *Torts* pp. 315-317.

In this case, it is equally impossible to apportion the harm to Amy amongst the numerous past, present and future defendants. This Defendant undeniably contributed to Amy's psychiatric "death by a thousand cuts" when he received and/or distributed her child pornography images with impunity until apprehended by law enforcement. By using images as barter for other images, the Defendant also profited from Amy's victimization and exploitation.

Congress recognized the difficulty in apportioning harm – so eloquently stated by Prosser – when it adopted 18 U.S.C. 3664 by imposing joint and several liability for possession, receipt and distribution of child pornography.

Calculating the Full Amount of Amy's Losses

A criminal restitution order is reviewed for abuse of discretion and will not be overturned provided that it is within the bounds of the statutory framework. *United States v. Johnson*, 132 F.3d 1279, 1286 (9th Cir. 1997). The trial court need only determine the amount of loss by a preponderance of the evidence. *United States v. Menza*, 137 F.3d 533, 537 (7th Cir. 1998). Hearsay testimony may be introduced at sentencing hearings to support a claim for restitution so long as the testimony has "sufficient indicia of reliability to support its probable accuracy." U.S.S.G. 6A1.3(a).

The Mandatory Restitution for Sex Crimes section of the Violence Against Women's Act of 1994 [18 U.S.C. 2259] requires the Defendant to pay Amy the "full amount" of her losses including any costs incurred for:

(A) medical services relating to physical, psychiatric, or psychological care;

(B) physical and occupational therapy or rehabilitation;

(C) necessary transportation, temporary housing, and child care expenses;

(D) lost income;

(E) attorneys' fees, as well as other costs incurred; and

(F) any other losses suffered by the victim as a proximate result of the offense.

Two unrebutted experts calculated the "full amount" of Amy's losses at $3,408,404. A University of Chicago educated Doctor of Economics, Stan V. Smith, in consultation with Amy's distinguished forensic psychologist, Dr. Joyanna Silberg, calculated Amy's cost of future treatment and counseling at $512,681. Amy's lost and reduced income as a result of her abuse and exploitation was actuarially calculated by Dr. Smith, after consulting Dr. Silberg, at $2,855,173.

In addition, Amy's expert witness fees are $15,550. Amy's attorney's fees as well as other costs incurred in this case are not yet finalized.

In determining the minimum amount of Amy's loss, the Court can consider Congress' presumption in Masha's Law [18 U.S.C. 2255] that victims of child pornography "shall be deemed to have sustained damages of no less than $150,000 in value."[4] See

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[4] Masha's Law is a civil remedy separate and apart from criminal restitution. The relationship between criminal restitution and civil tort actions was discussed by the Seventh Circuit Court of Appeals in *U.S. v. Bach*, 172 F.3d 520 (7th Cir. 1999): "The [MVRA] requires the court to identify the defendant's victims and to order restitution to them in the amount of their loss. In other words, definite persons are to be compensated for definite losses just as if the persons were successful tort plaintiffs. Crimes and torts frequently overlap. In particular, most crimes that cause definite losses to ascertainable victims are also torts . . . Functionally, the Mandatory Victims Restitution Act is a tort statute, though one that casts back to a much earlier era of Anglo-American law, when criminal and tort proceedings were not clearly distinguished. The Act enables the

(Continued on following page)

United States v. Estep, 378 F.Supp.2d 763 n. 4 (E.D.Ky. 2005).

In *In re Hawaiian Airlines, Inc.*, 355 B.R. 225 (D.Ha 2006), a federal district court ruled that a victim may obtain statutory damages on a per-violation basis, resulting in an award of statutory damages for each violation of the law. The statutory damages set forth in Masha's Law may therefore be multiplied by the number of images downloaded by the Defendant, or for each violation of each provision of the law, or both.

For example, a defendant who pleads guilty to two distinct violations of the federal child pornography laws, such as receipt and distribution of Amy's child pornography images in violation of 18 U.S.C. 2252A(a)(2), will be minimally liable for $300,000 in

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tort victim to recover his damages in a summary proceeding ancillary to a criminal prosecution. . . . It is a detail from a defrauder's standpoint whether he is ordered to make good his victims' losses in a tort suit or in the sentencing phase of a criminal prosecution." *Id.* at 523. See also *U.S. v. Duncan*, 870 F.2d 1532 (10th Cir. 1989) (where a civil suit covered the same alleged acts of wrongdoing as the restitution order, and the amount of compensatory damages sought in the civil suit was no greater than the amount alleged by the Government in connection with the criminal offense, there was no abuse of discretion in the district court's deferral to judgment in the civil suit in determining the proper amount of restitution); *U.S. v. Rhodes*, 201 F.Supp.2d 906 (C.D.Ill. 2002) (restitution was not limited to a mail fraud defendant's personal gain; rather, it tracked recovery to which victim would have been entitled in civil suit against the defendant).

damages using a "per violation" statutory damages theory ($150,000 for receipt plus $150,000 for distribution).[5]

Using a "per image" statutory damages theory, a defendant who receives four of Amy's child pornography images in violation of 18 U.S.C. 2252A(a)(2) will be minimally liable for $600,000 in damages ($150,000 for each image).

Both of these theories can also be combined. A defendant who both receives and distributes four of Amy's child pornography images commits eight violations of the law and is therefore minimally liable for $1,200,000 in damages ($150,000 multiplied by eight).

The Attorney General Guidelines

Congress has repeatedly stressed the importance of mandatory restitution:

> The committee believes that restitution must be considered a part of the criminal sentence, and that justice cannot be considered served until full restitution is made. . . . The committee also intends that the defendant's

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[5] In a recent civil case, *Tilton v. Deslin Hotels, Inc.*, Case No. 8:05-CV-692-T-30TGW (M.D. Fla. Sept. 6, 2007), a federal district court awarded a default judgment of $100,000 under the old version of Masha's Law (in which the statutory damages were $50,000 per violation) based on one violation of 18 U.S.C. 2252A(a) and one violation of 18 U.S.C. 2251(a).

> affidavit stating the defendant's assets and ability to pay be subject to strict review by the court. In particular, the committee is concerned that defendants not be able to fraudulently transfer assets that might be available for restitution.

Senate Report 104-179, p. 20.

In furtherance of this mandate, we encourage the Government to follow the *Attorney General Guidelines for Victim and Witness Assistance* (May 2005) and seek a prejudgment restraint of the defendant's assets through an injunction prior to sentencing – either voluntary or pursuant to a properly supported motion – to prevent the dissipation or transfer of assets for the benefit of crime victims such as Amy. (See 18 U.S.C. 1345) *Attorney General Guidelines*, p. 39.

Since any criminal monetary penalties must be paid immediately and may be enforced immediately, the Government should encourage the defendant to make payment toward his restitution obligation before the imposition of sentence as directed in U.S.S.G. 3E1.1, cmt. n.1(c) and the *Attorney General Guidelines*, p. 40.

Once restitution is ordered, a lien in favor of the United States should be filed on the defendant's property and rights to property as if it were liability for unpaid taxes. 18 U.S.C. 3613(c). According to the *Attorney General Guidelines*, this lien should be filed by the Financial Litigation Unit in all cases in which

restitution is ordered in an amount greater than $500 and not immediately paid. *Attorney General Guidelines*, p. 45.

If the defendant does not have sufficient assets to pay the restitution order immediately without using forfeitable property, the Government is encouraged to use the procedural provisions of the forfeiture statutes to preserve and recover forfeitable property and to apply such property toward satisfaction of the restitution order. *Attorney General Guidelines*, p. 46.

Finally, even though Amy has reached legal adulthood, we ask that the Government continue to recognize her as a child sex crime victim and scrupulously protect her privacy in accordance with 18 U.S.C. 3509(d) and the *Attorney General Guidelines*. Any documents that disclose her name or any other information concerning her should be held in a secure place and disclosed only to persons who by reason of their participation in the proceeding have reason to know the information.

Please notify me immediately if you plan on filing papers that disclose Amy's real name or if you must, for any reason, disclose her identity to the defendant or his attorney. In either situation, the Government should move for an order that Amy's name, address, social security number, and other nonphysical identifying information (other than her age or approximate age) shall not be admissible and may be redacted from otherwise admissible evidence pursuant to 18 U.S.C. 2252A(e).

Conclusion

Federal law is clear concerning criminal restitution for victims of child pornography: the Defendant must pay Amy the "full amount" of her losses regardless of how many other people are complicit in the crimes against her. The act of one is the act of all and liability for all that is done must be visited upon each defendant.

In calculating the full amount of Amy's losses under 18 U.S.C. 2259, the Court must include a variety of damages including psychological care, lost income and attorney's fees which in Amy's case amounts to at least $3,448,954. There is nothing in the statute that provides for a proportionality analysis.

Since there is no rational basis upon which to apportion damages, Congress provided clear guidance in 18 U.S.C. 2255 that at absolute minimum, victims of child pornography have sustained damages of no less than $150,000 in value.

As Amy told Dr. Silberg, "[e]veryday I have to live in fear of these pictures being seen." According to Dr. Silberg:

> [Amy] states when she is at a friend's house, she is afraid that someone might use Google and that when they Google her name, pictures of her might "pop up" and she would be humiliated. She feels that her privacy has been invaded on a fundamental level as these pictured acts in which she was an unwilling

> participant are there for other people to find against her will. She fears the discovery of the pictures by her friends, but she also fears the unknown and unnamed people who continue to be looking at these pictures of her for their own perverse interests or to "groom" other children into these acts. She feels continually violated when she contemplates these possibilities. As Amy stated, "*I don't want to be there, but I have to be there and it's never going away, and that's a scary thought.*"

Silberg, *Psychological Consultation* at p. 4.

As the criminal justice system carefully considers restitution, it should remember the fear, isolation and personal violation Amy feels every day of her life. The Defendant reaped pleasure from this fear and violation and could have refused to profit from Amy's child pornography images but did not. As Congress said, "restitution must be considered a part of the criminal sentence . . . justice cannot be considered served until full restitution is made." Thank you for your careful attention to this matter.

Sincerely,

/s/ James R. Marsh
James R. Marsh
Attorney for Amy

enclosures

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

Victim Impact Statement of Amy – the Victim in the Misty Series

I am a 19 year old girl and I am a victim of child sex abuse and child pornography. I am still discovering all the ways that the abuse and exploitation I suffer has hurt me, has set my life on the wrong course, and destroyed the normal childhood, teenage years, and early adulthood that every one deserves.

My uncle started to abuse me when I was only 4 years old. He used what I now know are the common ways that abusers get their victims ready for abuse and keep them silent: he told me that I was special, that he loved me, and that we had our own "special secrets." Since he lived close to our house, my mother and father didn't suspect anything when I walked over there to spend time with him.

At first he showed me pornographic movies and then he started doing things to me. I remember that he put his finger in my vagina and that it hurt a lot. I remember that he tried to have sex with me and that it hurt even more. I remember telling him that it hurt. I remember that much of the time I was with him I did not have clothes on and that sometimes he made me dress up in lingerie. And I remember the pictures.

After the abuse he would take me to buy my favorite snack which was beef jerky. Even now when I eat beef jerky I get feelings of panic, guilt, and humiliation. It's like I can never get away from what happened to me.

At the time I was confused and knew it was wrong and that I didn't like it, but I also thought it was wrong for me to tell anything bad about my uncle who said he loved me and bought me things I liked. He even let me ride on his motorcycle. Now I will never ride on a motorcycle again. The memories are too upsetting.

There is a lot I don't remember, but now I can't forget because the disgusting images of what he did to me are still out there on the Internet. For a long time I practiced putting the terrible memories away in my mind. Thinking about it is still really painful. Sometimes I just go into staring spells when I am caught thinking about what happened and not paying any attention to my surroundings.

Every day of my life I live in constant fear that someone will see my pictures and recognize me and that I will be humiliated all over again. It hurts me to know someone is looking at them – at me – when I was just a little girl being abused for the camera. I did not choose to be there, but now I am there forever in pictures that people are using to do sick things. I want it all erased. I want it all stopped. But I am powerless to stop it just like I was powerless to stop my uncle.

When they first discovered what my uncle did, I went to therapy and thought I was getting over this. I was very wrong. My full understanding of what happened to me has only gotten clearer as I have gotten older. My life and my feelings are worse now because the

crime has never really stopped and will never really stop.

It is hard to describe what it feels like to know that at any moment, anywhere, someone is looking at pictures of me as a little girl being abused by my uncle and is getting some kind of sick enjoyment from it. It's like I am being abused over and over and over again.

I find myself unable to do the simple things that other teenagers handle easily. I do not have a driver's license. Every time I say I am going to do it, I don't. I can't plan well. My mind skips out on me when I think about moving forward with my life. I have been trying to get a job, but I just keep avoiding things. Forgetting is the thing I do best since I was forced as a little girl to live a double life and "forget" what was happening to me. Before I realize it, I miss interviews or other things that will help me get a job.

Sometimes things remind me of the abuse and I don't even realize it until it is too late. For example, I failed anatomy in high school. I simply could not think about the body because of what happened to me. The same thing happened in college. I went to a psychology class where we watched a video about child abuse. Without even realizing why, I just stopped going to class. I failed my freshman year of college and moved back home.

It's easy for me to block out my feelings and avoid things that make me uncomfortable. I don't know when I will be ready to go back to college because I have huge problems with avoiding anything that makes me uncomfortable or reminds me of my abuse.

I am always scared that people can look at me and tell that I am a victim of sex abuse because my abuse is a public fact. I am worried that when my friends are on the Internet they are going to come across my pictures and it fills me with shame and embarrassment.

I am humiliated and ashamed that there are pictures of me doing horrible things with my uncle. Everywhere I go I feel judged. Am I the kind of person who does this? Is there something wrong with me? Is there something sickening and disgusting about who I am?

I am embarrassed to tell anyone what happened to me because I'm afraid they will judge me and blame me for it. I live in a small town and I think that if one person knows then everyone will know. I am just living in fear of the day someone sees those awful pictures of me and then "the secret" about me will be out. It's like my life is on hold for that day and I am frozen in time waiting. I know those disgusting pictures of me are stuck in time and are there forever for everyone to see.

I had terrible nightmares for a long long time. I would wake up sweating and crying and go to my parents for comfort. Now I still get flashbacks sometimes. There are thoughts in my head that are memories of the things that my uncle did to me. My heart will start racing and I will feel sweaty and then a stronger picture will pop up in my head and I have to leave the situation I am in. I have heard the voice of my uncle in my mind still talking to me saying, "don't

tell, don't tell, don't tell." Thinking and knowing that the pictures of all this are still out there just makes it worse. It's like I can't escape from the abuse, now or ever.

Because I've had so many bad dreams, I find it hard to sleep when it's dark. I like to keep the lights on thinking that will protect me from bad dreams. I hate scary movies and sometimes have nightmares for days.

Sometimes I have unreasonable fears that prevent me from doing the normal things that other kids do. My friend once asked me to go with her and her uncle to an amusement park. I could not get it out of my head that I would be abused. In the end I just couldn't go. I kept wondering if my friend's uncle had seen my pictures. Did he know me? Did he know what I did? Is that why he invited me to the amusement park?

Trust is a very hard thing for me and often people just make me uncomfortable. I had to quit a job I had as a waitress because there was a guy who I thought was always staring at me. I couldn't stop thinking, did he recognize me? Did he see my pictures somewhere? I was simply too uncomfortable to keep working there.

I have trouble saying "no" to people since I learned at a young age that I really don't have control over what's happening to me. I am trying to learn to get better at this because I know that not saying "no" makes it easier for someone to hurt me again.

Because of the way my uncle bribed me to perform sex acts on camera, I have trouble taking gifts from

anyone. I always feel that people will expect something from me if they give me a present. This makes it difficult in my relationship with friends.

I want to have children someday, but it frightens me terribly to think about how I could keep them safe. Who could I possibly trust? Their teacher? Their coach? I don't know if I could ever trust anyone with my children. And what if my children and their friends see my pictures on the internet? How could I ever explain to them what happened to me?

I am very confused about what love is. My uncle said he loved me and I wanted that love. But I know now that what he did to me is not love. But how will I be able to tell in the future if it is real love or just another person trying to exploit and use me?

The truth is, I am being exploited and used every day and every night somewhere in the world by someone. How can I ever get over this when the crime that is happening to me will never end? How can I get over this when the shameful abuse I suffered is out there forever and being enjoyed by sick people?

I am horrified by the thought that other children will probably be abused because of my pictures. Will someone show my pictures to other kids, like my uncle did to me, then tell them what to do? Will they see me and think it's okay for them to do the same thing? Will some sick person see my picture and then get the idea to do the same thing to another little girl? These thoughts make me sad and scared.

I blame myself a lot for what happened. I know I was so little, but why didn't I know better? Why didn't I stop my uncle? Maybe if I had stopped it there wouldn't be so many pictures out there that I can never take back or erase. I feel like now I have to live with it forever and that it's all my fault.

I feel like I am unworthy of anything and a failure. What have I been good for except to be used by others over and over again. That's one of the reasons I haven't been able to get a job or stay in school. I'm tired of disappointing myself. I've already had enough disappointment for a lifetime and just don't want any more failure. To me this brings back all the terrible feelings and shame of abuse and exploitation.

Sometimes I deal with my feelings by trying to forget everything by drinking too much. I know this isn't good, but my humiliation and angry feelings are there with me all the time and sometimes I just need a way to make them go away for awhile.

I feel like I have always had to live a double life. First I had to lie about what my uncle was doing to me. Then I had to act like it didn't happen because it was too embarrassing. Now I always know that there is another "little me" being seen on the internet by other abusers. I don't want to be there, but I am. I wish I could go back in time and stop my uncle from taking those pictures, but I can't.

Even though I am scared that I will be abused or hurt again because I am making this victim impact statement, I want the court and judge to know about me

and what I have suffered and what my life is like. What happened to me hasn't gone away. It will never go away. I am a real victim of child pornography and it effects me every day and everywhere I go.

Please think about me and think about my life when you sentence this person to prison. Why should this person, who is continuing my abuse, be free when I am not free?

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

Childhood Recovery Resources

Report of Psychological Consultation
(Please Note: This is a version of a psychological consultation of a victim of sexual abuse and child pornography who wishes to remain anonymous, and her name is changed in this document to Amy. The full report is available to authorized readers, with the correct name. Other than the name change, this report is identical to the originally submitted report.)

Name: Amy A
Birth Date: June 14, 1989
Date of Evaluation: June 11, June 12, July 29, November 10, 2008
Evaluator: Joyanna Silberg, Ph.D.
Date of Report: November 21, 2008

Reason for Referral:

Attorney James Marsh referred Amy for a forensic evaluation to determine the psychological effects of her continuous re-victimization in the form of internet pornographic photographs of her being exchanged and viewed. The purpose of this evaluation was to document the current effects on Amy of this re-victimization and describe the potential for long-standing future effects as a result of this victimization.

Sources of Information:

In Person Interviews with Amy A: June 11, 2008; June 12, 2008; July 29, 2008; November 10, 2008

Review of Documents:

Police Complaint against Eugene Zebroski, March 1997

Criminal Complaint against Eugene Zebroski, October 14, 1997 of oral, digital, and attempted anal or vaginal in January to October 1997

October 20, 1998, Grand Jury Indictment

October 27, 1998, Federal Criminal Complaint

Government's Statement of the Offense, December, 14, 1998

Psychotherapy Notes of Ruby Salazar, LCSW, BCD, Oct 21,1998-December 12, 1999 Psychosocial Treatment Report, dated February 22, 1999

Psychological Testing by Daniel Bruiner, Ph.D, dated March 1, 1999

Defendant's Guilty Plea, December 24, 1998

Revocation of Detention Order and Release on Personal Recognizance, July 28, 1999 Sentence of Eugene Zebroski, May 25, 1999 for rape, involuntary deviate sexual intercourse, aggravated indecent assault

Proceedings at Sentencing for Eugene Zebroski, May 25, 1999

Press Release, Department of Justice, October 17, 2008

Letter, September 22, 2008 restitution request from James Marsh to Ms. Slater

Psychological Instruments:

Trauma Symptom Inventory
Dissociative Experiences Scale

Summary of Case History

According to documents reviewed, an investigation began in 1997 of a man in Washington State who was purchasing internet child pornography from a man in Scranton, Pennsylvania. Though tracking of his email address, this man in Pennsylvania was identified as Eugene Zebroski, Amy's uncle. The pornographic pictures that had been forwarded to the Washington State man showed a particular setting with gray carpet and identifiable furniture that matched Mr. Zebroski's home. The child in the pictures was identified as Amy, who was Mr. Zebroski's niece who lived close by and visited frequently. The pictures showed acts of rape, oral sodomy, and digital penetration as well as posed suggestive pictures with genitals exposed. Zebroski was charged with both State and Federal charges and is currently serving time.

The continued accessibility of internet and the ease with which child pornography can be distributed has led Amy's picture to continue to be viewed, traded, and purchased. Currently, an international businessman was charged and has pled guilty to trading and viewing images of Amy and a restitution hearing has been set. He is apparently one of a large number of individuals who have been found to possess Amy's images created by her uncle in the 1990's.

Amy underwent an initial course of therapy with Ms. Ruby Salazar beginning in October of 1998 when she was 9 and four months. At the time, Amy revealed to Ms. Salazar acts including digital penetration, forced oral sodomy, and oral abuse of Amy to her genitals. The disclosures to her therapist further describe her being forced to manually stimulate her perpetrator, being required to perform sex acts telephonically and over the computer, soliciting friends for sexual acts, and planned meetings with other potential abusers (it is unclear if these arranged meetings took place.) Symptoms reported to Ms. Salazar at the time of this initial course of therapy included intrusive recollections, difficulty concentrating in school, fearfulness, anxiety, depression, hypervigilance, feelings of guilt, difficulties with trust and intimacy, and confusion about her attachment to the abuser.

Her psychological testing showed feelings of mistrust, anger and guilt in interpersonal relationships, morbid themes, expectation of victimization in interpersonal relationships and an underlying fragility. The evaluator noted a facade of adjustment, but a fragility under this seemingly strong facade.

Ms. Salazar further noted strengths in Amy such as creativity, sensitivity, and empathy which predicted a good response to therapy. By the end of treatment in 1999, Ms. Salazar's notes reported that Amy was "back to normal." Amy's involvement in dance and other age appropriate activities and support of her family appear to have helped her in coping with this trauma as a young girl.

Despite this optimistic assessment following this initial course of treatment, Amy's functioning appeared to decline as she reached her teenage years as documented by Amy in the clinical interview described below. At that time, problems with alcohol abuse and academic achievement became prominent. The issues from her past abuse escalated in prominence as she became faced with decision-making involving issues of trust and intimacy and future planning about her life.

Most significantly, at the age of 17, Amy was informed through legal notifications about the widespread presence of her picture on the internet, illustrating to her that in some ways the sexual abuse of her has never really ended. This knowledge further exacerbated her symptoms, interfered with her ability to overcome the increasing symptoms of post traumatic stress, and impeded her ability to move on with her life. This is described in detail below.

History from Amy

In 7 and a half hours of interview, Amy catalogued in great detail the initial effects of the abuse and the ongoing effects of the re-victimization from the trading of her image on the internet. She impressed the examiner as a bright girl, who had developed a habit of putting things out of her mind to avoid facing unpleasant memories. However, with gentle inquiry, Amy was able to be very explicit about the various ways that these experiences have impacted her. She

described that each discovery of another defendant that has traded her image re-traumatizes her again.

She was able to remember the initial events of the picture taking, though not in great detail. She remembers that she had gone to her uncle's home independently when she was as young as 4 or 5, and that she began to sleep at his house at a young age. She remembers that he showed her some pornographic pictures and movies and eventually he asked her to do things that she saw pictured. She said she can remember digital penetration and pain associated with it, with attempts at penile penetration as well, and she is unsure if he succeeded. She recalls that she told him that these actions hurt, and that he reassured her that it would hurt less over time.

She remembers that he required her to dress up in clothing that he picked out, and that sometimes he asked her to pose for pictures with no clothing on at all. She remembers that she would be given candy or beef jerky at a drug store after these sessions as a reward.

She remembers the day vividly when the police came to his house and removed his computer. She recalls that her family initially asked her if she had been involved but she denied involvement because he had told her not to tell, and she believed because he "loved" her, she should not tell. Eventually, she did reveal what had happened after her family explained to her that the actions he had asked her to do were wrong, and she was eventually taken to see Ms. Ruby Salazar, her therapist.

She remembers talking to Ms. Salazar, and believes that that initial therapy did help her in coping with her symptoms at the time. She remembers having repeated nightmares when she was younger accompanied by crying and waking up sweating. She would dream that he was getting out of jail and "coming to get" her and then have trouble getting back to sleep. She remembers feeling relief about talking about these events with her therapist, and particular relief that these secrets were not hers to bear alone.

However, Amy is clear that there has been a resurgence of the trauma with her ongoing realization that her image is being traded on the internet. Specifically, Amy mentions fear of discovery, shame, fears of the traumatization of others, and renewed self-blame about her participation.

As Amy stated, *"Everyday I have to live in fear of these pictures being seen."* She states when she is at a friend's house, she is afraid that someone might use Google and that when they Google her name, pictures of her might "pop up" and she would be humiliated. She feels that her privacy has been invaded on a fundamental level as these pictured acts in which she was an unwilling participant are there for other people to find against her will. She fears the discovery of the pictures by her friends, but she also fears the unknown and unnamed people who continued to be looking at these pictures of her for their own perverse interests or to "groom" other children into these acts. She feels continually violated when she contemplates these possibilities. As Amy stated, *"I*

don't want to be there, but I have to be there and it's never going away, and that's a scary thought."

When Amy thinks about the crimes, she is filled with feelings of anger and helplessness. She imagines that she might go back in time and change what occurred, but realizes that nothing can change the fact of the existence of these pictures no matter how much she wishes it.

Amy reports being plagued by feelings of shame. She feels what she was made to do is "dirty" and she is trapped in this sense of being dirty and shamed. Amy describes constantly being in a state of waiting for "the other shoe to drop," as someone new finds her picture, and discovers this painful and "dirty" secret about her..

Additionally, Amy has thoughts of self-blame even though she acknowledges that these are illogical. She feels like she could have stopped all of this, if she had just refused, said no, and walked away from her uncle. Now that the pictures continue to be discovered, these feelings of self-blame are particularly accentuated. If another child is abused by using her picture, Amy feels she is responsible for this abuse. This fills her with guilt.

One of the most traumatizing parts of her memory of her uncle is the manipulation she felt from him saying that he loved her. Amy reports ongoing problems with trust and intimacy as she struggles with knowing whom she can trust and who deserves her allegiance. She feels she must protect herself from confiding

completely even in her closest friends because her secret is too shameful. Amy was able to admit that she still hears the voice of her perpetrator in her mind, talking to her and telling her it is wrong to tell, and she must still keep the secret. She even has a visual image of this, seeing him on his knees and begging her to keep this secret. This compelling directive to keep the secret still haunts her and interferes with her complete trust and attachment to others.

She feels a desire to warn others about not being "tricked" by false claims of "love." Yet, she is aware her pictures may be used to trap other children into exploitation in the same way that she was trapped, and this is a terrifying thought.

Amy reported that she still can easily get triggered by the memories of these events and there are many things in the world that can activate her symptoms. Things that remind her of her uncle or were sites of abuse can activate her anxiety. For example, motorcycles, beef jerky, and amusement parks remain potent triggers for her as they remind her of activities that she engaged in with her uncle. Similarly, when shows come on television involving abuse, Amy reports getting feelings of fear and disgust and finding herself tearing up and crying.. She has a basic feeling that people are not going to understand her and that her secret about herself separates her from others. Her fear of discovery on the internet is coupled with her desire for privacy and secrecy and fear that no

one could really understand her or what she went though.

Amy has developed some habits of blocking out feelings and uncomfortable information which is often called dissociation. Dissociation is an automatic habit of mind which allows a traumatized individual to sequester painful information from awareness. Her mind may wander, she may daydream, forget what she is doing, and otherwise allow herself to avoid feeling something painful. This affects her planning skills and her ability to move forward. Many victims of sexual abuse and trauma engage in self-harming behaviors. Amy has a habit of biting her nails down very far and biting on her cuticles to the point of bleeding. This type of self-injury often serves to anesthetize victims from the experience of further pain and is another foul" of dissociation.

Amy's problem with alcohol appears to be an ongoing battle, which began when she was approximately 16. Amy attributes the escalation in drinking in part to her feelings about her brother who was dealing with a drug addiction at the time, as well as the ongoing issues with recovery from sexual abuse. Her drinking has escalated on and off reaching a peak when she was 17, and having intermittent periods of severity. There are indications that this problem has reached the level of alcoholism. She describes blackouts when she drinks too much, increasing tolerance, and regret about impulsive behaviors she has engaged in that have led to difficulty for her. Currently, Amy states

she is trying to be sober, but is not attending any support groups or AA to assist her with this.

Amy has had problems pursuing her educational goals due to these overwhelming feelings of shame, guilt, anger and helplessness, traumatic triggering effects, dissociation, and alcohol abuse. She had wanted to go to college and had a hoped to be able to go into psychology and possibly be a psychologist. Although she enrolled in college, she found herself not attending classes shortly after her psychology class saw a movie about abused children. The emotional reaction to this film with all of the accompanying overwhelming feelings was too much for her to bear, so she blocked out her reaction, and just avoided the source of the problem – her class. She further resorted to drinking as a further avoidance strategy to forget the source of her fears, and ultimately, she was forced to drop out of school

Amy went into further detail describing her basic difficulty getting things done and moving on with goals. She described a horrible fear of disappointment that relates to her profound disappointment from these experiences of abuse and exploitation in her life, which leads her not to try anything and give up easily as she fears further disappointments. She has found that if she focuses only on the present, and dulls her senses with alcohol, her feelings of shame, fear and humiliation are avoided. This is the coping tool she has been using for the past several years since she discovered the widespread availability of

these pictures and her ongoing unwitting re-victimization from moment to moment.

The widespread availability of her picture is almost too big for her to envision, and rather than think about the serious implications of this, she has become comfortable with avoidance of feelings, avoidance of planning, and thus avoidance of thinking too deeply about herself and her future.

On a positive note, going through the process of developing her Victim Impact Statement and discussing these events through these interviews have begun to empower her, and has helped her emerge in part from her feelings of shame. She has discussed an ongoing relationship with her boyfriend which she describes as a source of comfort in her life, although problems with communication, alcohol abuse, and over dependence have emerged in this relationship.

Psychological Testing Results:

The Trauma Symptom Index is a normed instrument developed to document symptomatic presentations following trauma. This questionnaire was normed on a reference group of traumatized men and women. This questionnaire is comprised of items that span a variety of symptoms known to be associated with traumatic stress, and these symptoms are organized into scales which yield a profile of the client's symptomatic reactions. T scores higher than 65% are considered significant clinical elevations.

On the Trauma Symptoms Index it is clear that Amy shows the features commonly associated with significant Post-Traumatic Stress with multiple clinically significant elevations. The validity scales indicate that this is a generally valid indicator of her symptoms without over reporting, underreporting, or misunderstanding of the basic questions. Some mild inconsistency was noted in her responses which is best accounted for by the fact that her symptoms have waxed and waned over the years, and she is making increased efforts to deal with some of the symptoms such as her alcohol abuse.

Both Intrusive Experiences (T score= 66) and Defensive Avoidance (T score = 72) are highly rated symptom clusters. Amy acknowledges intrusive symptoms such as thoughts popping up in her mind and sudden memories or flashbacks of unwanted images from the past. She also reports that she continues to suffer from bad dreams. Defensive Avoidance symptoms (T score= 71) include trying to put bad thoughts out of her mind, blocking memories, and making efforts to forget painful feelings and events. Amy's score on the Impaired Self-reliance scale (T score=70) indicates that she is struggling with maintaining a stable sense of self, lacks self confidence, and struggles with confusion between her needs and those of others. This scale is typically elevated with individuals who have suffered from early childhood trauma. Amy's high score on the Dissociative Scale (T score=77) indicates that she struggles with symptoms involving unconscious avoidance such as her mind going blank,

daydreaming, and absent-mindedness. Also clinically elevated are symptoms of Anxious Arousal (T score=66) which include feelings of jumpiness, nervousness, and exaggerated startle response. Amy also acknowledges utilizing abundant tension reducing behaviors to manage these symptoms such as fear of being alone, some self-harm (picking her nails and cuticles), and provoking arguments. Finally, Amy describes feelings of anger which give her a significant elevation on the Anger/Irritability Subscale (T score = 81). The only scales not significantly elevated, but with some symptoms evident, were Depression (T=52), Sexual Concerns (T=50) and Dysfunctional Sexual Behavior (T=54).

In summary, this symptom profile portrays Amy as a multiply symptomatic young lady with the three main clusters of post-traumatic stress symptoms intrusions, avoidance and hyperarousal. She has accompanying deficits in her view of her own self-efficacy, relies on dissociation to avoid confronting problems, acts out her feelings with angry behaviors towards those she is close to and utilizes tension reducing activities that may involve some self-harm.

The Dissociative Experiences Scale is a screening instrument that helps assess the presence of dissociative symptoms that may indicate the presence of a dissociative disorder. On the Dissociative Experiences Scale, Amy scored 38.9, which is considered to be in the clinically significant range. She acknowledged the following dissociative symptoms to a significantly high level – loss of awareness, having vivid flashback, high absorption, staring spells, feelings of derealization

and forgetfulness about her own behaviors. These behaviors indicate an ongoing pattern of dissociation as a coping tool with the overwhelming information she is constantly trying to avoid or deny. The symptoms on this screening tool suggest that a more full blown diagnosis of dissociative disorder might emerge at a later time, but the current interview does not support this as a primary diagnosis.

Analysis of the Impact of These Events on Amy

Based upon my evaluation of Amy, and my review of the records, I draw the following conclusions to a reasonable degree of psychological certainty based upon my background in the treatment of victims of sexual victimization and internet commercial exploitation, and my knowledge of developmental psychology and post-traumatic stress.

The sexual assault perpetrated against Amy, and its continued memorialization in pictures which continue to be traded and used affect her in a variety of ways, and has had long lasting and life changing impact on her.

Specifically, she has experienced significant effects in the following areas:

Mood regulation, cognitive distortions, feelings of shame, self-blame, and guilt, self-esteem, alcohol abuse, dissociation, academic progress, interpersonal relationships, and vocational success. In addition, despite some resolution of Amy's post-traumatic

symptoms when she was younger, Amy continues to have the hallmark features of posttraumatic stress disorder which include intrusive images, attempts at avoidance and denial, and hyper arousal.

These posttraumatic symptoms and effects of sexual abuse are more resistant to treatment than those that would normally follow a time limited trauma, as her awareness of the continued existence of the pictures and their criminal use in a widespread way leads to an activation in these symptoms. She is flooded with memories of what happened to her, since she knows at any moment others might see these. She tries to avoid this knowledge with unhealthy coping strategies such as alcohol abuse and dissociation, and she is overwhelmed with feelings of shame, self blame, and guilt. Planning for the future becomes difficult as planning involves thinking and processing her fears of the reality of these images, that she does not want to face or re-experience. Difficulty with planning and the presence of dissociation has led to her inability to follow though with educational or vocational plans. Furthermore, Amy has ongoing problems with trust in relationships which has interfered with working with authorities in jobs and interpersonal relationships. Although she reports the presence of a significant other, problems have emerged with communication and over-dependence in that relationship.

Research on sexual abuse and post-traumatic stress strongly supports that all of these are known sequelae of abuse, and Amy's history conforms to the expected

trajectory of victims like herself who experience early sexual abuse. There is sparse literature researching the effects of commercial child exploitation on children, particularly internet child pornography as it is a relatively new crime, whose victims are often unidentified. However, as noted by Klain, Davies and Hicks (2001) "Child victims of pornography face a lifetime of victimization because the pornography can be distributed indefinitely (p.11)".

The literature on child sexual abuse can inform us about how the added element of having one's picture viewed and traded on the internet can affect the rapidity with which the known symptoms of child sexual abuse and post-traumatic stress can be treated.

First, it is well-known that recovery from post-traumatic stress requires foremost a sense of safety that the trauma is over and that the past will not be replayed in the present (Briere & Scott, 2006) Yet, a victim of child pornography whose pictures remain present on the internet can never really have that sense of safety, or separation of the past and present. The past, in fact continues to be repeated in the present over and over again.. The safety is not there because the pictures can turn up at any time, and at any moment new moments of victimization are occurring everywhere.

Secondly, treatment for post-traumatic stress involves protection from the triggers that stimulate memories of the abuse. In the case of victims of child pornography, such protection from triggers is not completely

possible as the existence of the pictures themselves remain constant triggers. Specifically, Amy's awareness of these pictures, knowledge of new defendants being arrested become ongoing triggers to her.

Self-blame is an important dimension for victims of sexual abuse, and one of the most enduring fixed beliefs that victims must wrestle with. In the case of victims of internet child pornography, the self-blame is multiplied, as not only do they feel guilty about their own victimization but feel responsible for the potential victimization of others who may be forced to view their pictures as part of a grooming phase in preparation for acts of sexual abuse. This was clearly expressed by Amy.

Feelings of shame and humiliation are some of the worst affective reactions to treat in victims of sexual abuse. These feelings of shame and humiliation are multiplied exponentially for victims of internet child pornography. Anonymity is something we offer victims of sexual crimes with acknowledgement that they deserve this protection of privacy. Yet, knowing one's image is out there at all times is an invasion of privacy of the highest degree which makes the victim feel known, revealed and publicly shamed, rather than anonymous..

One vivid illustration of how difficult treatment is for Amy, is a description of one of the techniques used in dealing with flashbacks of abuse. In this imagery technique, the client is helped to imagine going back in time and standing up to the abuser to undo the

experience of victimization in their imagination. For victims like Amy, such a technique would actually be harmful as she has to face she can never erase the ongoing "evidence" and "proof' of what she was forced to do. Such an exercise would add to her feelings helplessness. For events in the past, imagery techniques work that help to separate the past from the present, but because of the existence of the pictures, such techniques would be ineffective and potentially harmful.

Another healing techniques is to have the victim find ways to use their experience to help others, which is something that Amy is expressing that she is committed to do. Yet, in doing so, Amy is constantly aware that her image out there, may actually be hurting other children who are potential victims of similar crimes.

The ongoing awareness that the pictures are out there interferes significantly with the therapeutic resolution of these problems, as she lives in an enduring state of feeling that she can never really escape or get away from abuse.

For these reasons, the re-victimization of Amy through the trading of her image on the internet is the source of enduring trauma that will have lasting effects on her and the symptoms she displays are particularly resistant to standard treatment for post-traumatic stress and the effects of sexual abuse.

Victims like Amy generally experience increased symptoms during developmental periods that are

reminiscent of the abuse. For example, when her own child becomes the age of her own victimization, she might relive her traumatic experiences more vividly. As Amy faces new developmental challenges, it is expected she will continue to struggle with the enduring effects of these traumatic experiences as described above over her lifetime. She will require weekly therapy, and it is likely there will be periods where more intensive inpatient or rehabilitation services will be required over the course of her lifetime.

Respectfully submitted,

Joyanna Silberg, Ph. D.
Licensed Psychologist

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

Smith Economics Group, Ltd.
A Division of Corporate Financial Group
Economics / Finance / Litigation Support

Stan V. Smith, Ph.D.
President

September 15, 2008

Mr. James R. Marsh
Marsh Law Firm
PO Box 4668 #65135
New York, NY 10163-4668

Re: [redacted]

Dear Mr. Marsh:

You have asked me to calculate the value of certain losses subsequent to the sexual exploitation of [redacted]. These losses are: (1) the loss of wages and employee benefits; (2) the present value of future treatment and counseling costs; and (3) the reduction in value of life ("RVL"), also known as loss of enjoyment of life.

[redacted] is a Caucasian, single female, who was born on [redacted] 1989, and suffered sexual abuse by her uncle which was made into child pornography at the age of 9 years. Ms. [redacted] will be 19.6 years old at the estimated trial or settlement date of January 1, 2009, with a remaining life expectancy estimated at 61.9 years. This data is from the

National Center for Health Statistics, *United States Life Tables, 2004,* Vol. 56, No. 9, National Vital Statistics Reports, 2007.

In order to perform this evaluation, I have reviewed the following materials: (1) an interview with Dr. Joyanna Silberg on September 13, 2008; and (2) the case information form. Additionally, it is my understanding that additional supportive information will be provided by Dr. Joyanna Silberg and Dr. Sharon Cooper.

My methodology for estimating the losses, which is explained below, is generally based on past wage growth, interest rates, and consumer prices, as well as studies regarding the value of life. The effective net discount rate using statistically average wage growth rates and statistically average discount rates is 0.50 percent.

My estimate of the real wage growth rate is 1.15 percent per year. This growth rate is based on Business Sector, Hourly Compensation growth data from the Major Sector Productivity and Costs Index found at the U.S. Bureau of Labor Statistics website at www.bls.gov/data/home.htm, Series ID: PRS84006103, for the real increase in wages primarily for the last 20 years.

My estimate of the real discount rate is 1.65 percent per year. This discount rate is based on the rate of return on 91-day U.S. Treasury Bills published in the *Economic Report of the President* for the real return on T-Bills primarily for the last 20 years. This

rate is also consistent with historical rates published by Ibbotson Associates, Chicago, in its continuously updated series *Stocks, Bonds, Bills and Inflation* published by Morningstar, Inc. This series, which acknowledges me as the Originator while a Principal and Managing Director at Ibbotson Associates, is generally regarded by academics in the field of finance as the most widely accepted source of statistics on the rates of return on investment securities. It is relied upon almost exclusively by academic and business economists, insurance companies, banks, institutional investors, CPA's, actuaries, benefit analysts, and economists in courts of law.

Estimates of real growth and discount rates are net of inflation based on the Consumer Price Index (CPI-U), published in monthly issues of the U.S. Bureau of Labor Statistics, *CPI Detailed Report* (Washington, D.C.: U.S. Government Printing Office) and available at the U.S. Bureau of Labor Statistics website at www.bls.gov/data/home.htm, Series ID: CUUR0000SA0. The rate of inflation for the past 20 years has been 3.04 percent.

I(A). LOSS OF WAGES AND EMPLOYEE BENEFITS – Full-Time Employment

Tables 1 through 3 show the loss of wages and benefits. Ms. [redacted] graduated high school and started college; however, she failed her first year due to impact of her sexual abuse and exploitation. Ms. [redacted]'s mother attended Biscayne Paramedical

Institute and has a certificate in Registered Medical Assistant. Ms. [redacted]'s father attended City of London Technical College and has a degree in Electrical Contracting. Ms. [redacted]'s brother graduated high school and attended Johnson Trade Center to study Electrical Contracting. Ms. [redacted] was interested in attending college and becoming an elementary school teacher.

Since the earnings of teachers is comparable to the earnings of female college graduates, the wage estimate starting in 2011 is illustrated at the average earnings of non-Hispanic, white females between the ages of 18 and 24 years old with a Bachelor's degree of $34,533 in year 2007 dollars. The wage estimate is grown in the year 2024 to the average earnings of non-Hispanic, white females between the ages of 35 and 44 years old with a Bachelor's degree of $61,587 in year 2007 dollars. This wage data is published in the U.S. Bureau of the Census and the Bureau of Labor Statistics, *Current Population Survey, Annual Social and Economic Supplement,* Washington, D.C., 2008.

Employee benefit estimates are based on data from the U.S. Chamber of Commerce, *2007 Employee Benefits Study,* (Washington, DC: Statistics and Research Center, 2008). I have assumed that employee benefits grow at the same rate as wages and are discounted to present value at the same discount rate. Since these tables assume full-time work, I do not include employee benefits relating to unemployment, injury,

illness or disability; benefits are estimated at 29.3 percent of wages.

I assume full-time employment each year and show the accumulation through life expectancy. While these tables are calculated through the end of life expectancy, the losses from working full-time through any assumed retirement age can be read off the table.

Based on the above assumptions, my opinion of the wage loss for full-time employment is $4,121,025 ▶ Table 3. This figure assumes full-time work to age 81.5, but any assumed retirement age may be read from Table 3; for example, the full-time employment wage loss to age 67 is $3,204,353.

I(B). EARNINGS CAPACITY OFFSET

Tables 4 through 6 show the offset to wages. Ms. [redacted] dropped out of college when she discovered the extent of her victimization, and she is currently unemployed. Based on my interview with Dr. Joyanna Silberg, Ms. [redacted] is currently only able to do part-time, low lever work, if she is able to work at all.

The offset starting January 1, 2009 is illustrated at a benchmark of $10 per hour for 15 hours per week. Employee benefits are estimated at 6.2 percent of wages.

Based on these assumptions, my opinion of the wage *offset* is $436,091 ▶ Table 6 for full-time employment. This figure assumes work to age 81.5, but any

assumed retirement age may be read from Table 6. For example, the wage *offset* to age 67 is $349,180.

The net loss of earnings capacity is $2,855,173 to age 67.

II. COST OF FUTURE TREATMENT AND COUNSELING COSTS

Table 7 shows the cost of future treatment and counseling costs. The present value of treatment and counseling costs is based on my interview with Dr. Joyanna Silberg and expected testimony of Dr. Silberg and Dr. Cooper. It is my understanding that Ms. [redacted] will require counseling for the remainder of her life. I illustrate counseling costs at one hour per week at $150 per hour, which is $7,800 annually.

Dr. Silberg states that Ms. [redacted] will also require approximately 3 institutionalizations during her lifetime at various stages of her life, which range from $30,000 to $50,000 per institutionalization, which is an average of $120,000 over her lifetime, or $1,938.61 annually.

The annual future treatment and counseling costs starting on January 1, 2009 are illustrated at $9,739. Future costs are illustrated to grow at 1.15 percent real wage growth.

Based on this information, my opinion of the average cost of future treatment and counseling costs is $512,681 ▶ Table 7.

III. REDUCTION IN VALUE OF LIFE

Tables 8 through 10 show the loss of the value of life. Economists have long agreed that life is valued at more than the lost earnings capacity. My estimate of the value of life is based on many economic studies on what we, as a contemporary society, actually pay to preserve the ability to lead a normal life. The studies examine incremental pay for risky occupations as well as a multitude of data regarding expenditure for life savings by individuals, industry, and state and federal agencies. Based on the average value of a statistical life and life expectancy of 81.5 years, my opinion of the loss of the value of life for [redacted] is $8,886,300 ▶ Table 10.

My estimate of the value of life is consistent with estimates published in other studies that examine and review the broad spectrum of economic literature on the value of life. Among these is "The Plausible Range for the Value of Life," *Journal of Forensic Economics,* Vol. 3, No. 3, Fall 1990, pp. 17-39, by T. R. Miller. This study reviews 67 different estimates of the value of life published by economists in peer-reviewed academic journals. The results, in most instances, show the value of life to range from approximately $1.6 million to $2.9 million dollars in year 1988 after-tax dollars, with a mean of approximately $2.2 million dollars, and variance in the estimate of the mean of up to 40 percent. In "The Value of Life: Estimates with Risks by Occupation and Industry," Harvard University, John M. Olin Center for Law, Economics, and Business, No. 442, May

2003, Professor W. K. Viscusi estimates the value of life to be approximately $4.7 million dollars in year 2000 dollars.

Because it is generally accepted by economists, the methodology used to estimate the value of life has been found to meet *Daubert* standards, as well as *Frye* standards and the Rules of Evidence in various states, by Federal Circuit and Appellate courts, as well as state trial, supreme and appellate courts nationwide. Testimony based on this peer-reviewed methodology has been admitted in over half the states in over 175 trials nationwide.

Proof of general acceptance and other standards is found in a discussion of the extensive references to the scientific economic peer-reviewed literature on the value of life listed in the **Value of Life Appendix** to this report.

The underlying, academic, peer-reviewed studies fall into two general groups: (1) consumer behavior and purchases of safety devices; (2) wage risk premiums to workers; in addition, there is a third group of studies consisting of cost-benefit analyses of regulations. For example, one consumer safety study analyzes the costs of smoke detectors and the lifesaving reduction associated with them. One wage premium study examines the differential rates of pay for dangerous occupations with a risk of death on the job. Just as workers receive shift premiums for undesirable work hours, workers also receive a higher rate of pay to accept a increased risk of death on the job. A

study of government regulation examines the lifesaving resulting from the installation of smoke stack scrubbers at high-sulphur, coal-burning power plants. As a hypothetical example of the methodology, assume that a safety device costs $460 and results in lowering a person's risk of premature death by one chance in 5,000. As a hypothetical example of the methodology, assume that a safety device costs $460 and results in lowering a person's risk of premature death by one chance in 2,500. The cost per life saved is obtained by dividing $460 by the one in 2,500 probability, yielding $4,600,000. Overall, based on the peer-reviewed economic literature, I estimate the central tendency of the range of the economic studies cited above which I estimate to be credibly as high as $5.7 million in year 2008 dollars.

A trier-of-fact may weigh other factors to determine if these estimated losses for [redacted] should be adjusted because of special qualities or circumstances that economists do not as yet have a methodology for analysis. These estimates are provided as an aid, tool and guide for the trier-of-fact.

All opinions expressed in this report are clearly labeled as such. They are rendered in accordance with generally accepted standards within the field of economics and are expressed to a reasonable degree of economic certainty. Estimates, assumptions, illustrations and the use of benchmarks, which are not opinions, but which can be viewed as hypothetical in nature, are also clearly disclosed and identified herein.

In my opinion, it is reasonable for experts in the field of economics and finance to rely on the materials and information I reviewed in this case for the formulation of my substantive opinions herein.

If additional information is provided to me, which could alter my opinions, I may incorporate any such information into an update, revision, addendum, or supplement of the opinions expressed in this report.

If you have any questions, please do not hesitate to call me.

Sincerely,

/s/ Stan V. Smith
Stan V. Smith, Ph.D.
President

APPENDIX: VALUE OF LIFE

The economic methodology for the valuation of life has been found to meet the *Daubert* and *Frye* standards by many courts, along with the Rules of Evidence in many states nationwide. My testimony has been accepted in approximately 175 state and federal jurisdictions nationwide in over half the states. Testimony has been accepted by Federal circuit and Appellate courts as well as in state trial, supreme, and appellate Courts. The *Daubert* standard sets forth four criteria:

1. Testing of the theory and science
2. Peer Review

3. Known or potential rate of error
4. Generally accepted.

Testing of the theory and science has been accomplished over the past four decades, since the 1960s. Dozens of economists of high renown have published over a hundred articles in high quality, peer-reviewed economic journals measuring the value of life. The value of life theories are perhaps among the most well-tested in the field of economics, as evidenced by the enormous body of economic scientific literature that has been published in the field and is discussed below.

Peer Review of the concepts and methodology have been extraordinarily extensive. One excellent review of this extensive, peer-reviewed literature can be found in "The Value of Risks to Life and Health," W. K. Viscusi, *Journal of Economic Literature,* Vol. 31, December 1993, pp. 1912-1946. A second is "The Value of a Statistical Life: A Critical Review of Market Estimates throughout the World." W. K. Viscusi and J. E. Aldy, *Journal of Risk and Uncertainty,* Vol. 27, No. 1, November 2002, pp. 5-76. Additional theoretical and empirical work by Viscusi, a leading researcher in the field, can be found in: "The Value of Life", W. K. Viscusi, John M. Olin Center for Law, Economics, and Business, Harvard Law School, Discussion Paper No. 517, June 2005. An additional peer-reviewed article discusses the application to forensic economics: "The Plausible Range for the Value of Life," T. R. Miller, *Journal of Forensic Economics,*

Vol. 3, No. 3, Fall 1990, pp. 17-39, which discusses the many dozens of articles published in other peer-reviewed economic journals on this topic. This concept is discussed in detail in "Willingness to Pay Comes of Age: Will the System Survive?" T. R. Miller, *Northwestern University Law Review,* Summer 1989, pp. 876-907, and "Hedonic Damages in Personal Injury and Wrongful Death Litigation," by S. V. Smith in *Litigation Economics,* pp. 39-59.

Kenneth Arrow, a Nobel Laureate in economics, discusses this method for valuing life in "Invaluable Goods," *Journal of Economic Literature,* Vol. 35, No. 2, 1997, pp. 759.

The known or potential rate of error is well researched. All of these articles discuss the known or potential rate of error, well within the acceptable standard in the field of economics, generally using a 95% confidence rate for the statistical testing and acceptance of results. There are few areas in the field of economics where the known or potential rate of error has been as well-accepted and subject to more extensive investigation.

General Acceptance of the concepts and methodology on the value of life in the field of economics is extensive. This methodology is and has been generally accepted in the field of economics for many years. Indeed, according to the prestigious and highly-regarded research institute, *The Rand Corporation,* by 1988, the peer-reviewed scientific methods for estimating the value of life were well-accepted: "Most

economists would agree that the willingness-to-pay methodology is the most conceptually appropriate criterion for establishing the value of life," *Computing Economic loss in Cases of Wrongful Death,* King and Smith, Rand Institute for Civil Justice, R-3549-ICJ, 1988.

While first discussed in cutting edge, peer-reviewed economic journals, additional proof of general acceptance is now indicated by the fact that this methodology is now taught in standard economics courses at the undergraduate and graduate level throughout hundreds of colleges and universities nationwide as well as the fact that it is taught and discussed in widely-accepted textbooks in the field of law and economics: *Economics,* Sixth Edition, David C. Colander, McGraw-Hill Irwin, Boston, 2006, pp. 463-465; this introductory economics textbook is the third most widely used textbook in college courses nationwide. Hamermesh and Rees's *The Economics of Work and Pay,* Harper-Collins, 1993, Chapter 13, a standard advanced textbook in labor economics, also discusses the methodology for valuing life. Other textbooks discuss this topic as well. Richard Posner, a Justice and former Chief Justice of the U.S. Court of Appeals for the highly regarded 7th Circuit and Senior Lecturer at the University of Chicago Law School, one of most prolific legal writers in America, details the Value of Life approach in his widely used textbooks: *Economic Analysis of Law,* 1986, Little Brown & Co., pp. 182-185 and *Tort Law,* 1982, Little Brown & Co., pp. 120-126.

As further evidence of general acceptance in the field, many surveys published in the field of forensic economics show that hundreds of economics nationwide are now familiar with this methodology and are available to prepare (and critique) forensic economic value of life estimates. Indeed, many economists who indicate they will prepare such analysis for plaintiffs also are willing to critique such analysis for defendants, as I have often done. That an economist is willing to critique a report does not indicate that he or she is opposed to the concept or the methodology, but merely available to assure that the plaintiff economist has employed proper techniques. The fact that there are economists who indicate they do not prepare estimates of value of life is again no indication that they oppose the methodology: many claim they are not familiar with the literature and untrained in this area. While some CPAs and others without a degree in economics have opposed these methods, such professionals do not have the requisite academic training and are unqualified to make such judgements. However, as in any field of economics, this area is not without controversy and there are some qualified and trained economists who dispute certain aspects of the methodology. General acceptance does not mean universal acceptance.

Additional evidence of general acceptance in the field is found in the teaching of the concepts regarding the value of life. Forensic Economics is now taught as a special field in a number of institutions nationwide. I taught what is believed to be the first course ever presented in the field of Forensic Economics

at DePaul University in Spring, 1990. My own book, *Economic/Hedonic Damages,* Anderson, 1990, and supplemental updates thereto, coauthored with Dr. Michael Brookshire, a Professor of Economics in West Virginia, has been used as a textbook in at least 5 colleges and universities nationwide in such courses in economics, and has a thorough discussion of the methodology. Toppino et. al., in "Forensic Economics in the Classroom," published in *The Earnings Analyst,* Journal of the American Rehabilitation Economics Association, Vol. 4, 2001, pp. 53-86, indicate that hedonic damages is one of 15 major topic areas taught in such courses.

Lastly, general acceptance is found by examining publications in the primary journal in the field of Forensic Economics, which is the peer-reviewed *Journal of Forensic Economics,* where there have been published many articles on the value of life. Some are cited above. Others include: "The Econometric Basis for Estimates of the Value of Life," W. K. Viscusi, Vol. 3, No. 3, Fall 1990, pp. 61-70; "Hedonic Damages in the Courtroom Setting." S. V. Smith, Vol. 3, No. 3, Fall 1990, pp. 41-49; "Issues Affecting the Calculated Value of Life," E. P. Berla, M. L. Brookshire and S. V. Smith, Vol. 3, No. 1, 1990, pp. 1-8; "Hedonic Damages and Personal Injury: A Conceptual Approach." G. R. Albrecht, Vol. 5., No. 2, Spring/Summer 1992, pp. 97-104; "The Application of the Hedonic Damages Concept to Wrongful and Personal Injury Litigation." G. R. Albrecht, Vol. 7, No. 2, Spring/Summer 1994, pp. 143-150; and also "A Review of the Monte Carlo

Evidence Concerning Hedonic Value of Life Estimates," R. F. Gilbert, Vol. 8, No. 2, Spring/Summer 1995, pp. 125-130.

It is important to note that this methodology is endorsed and employed by the U. S. Government as the standard and recommended approach for use by all U. S. Agencies in valuing life for policy purposes, as mandated in current and past Presidential Executive Orders in effect since 1972, and as discussed in "Report to Congress on the Costs and Benefits of Federal Regulations," *Office of Management and Budget,* 1998, and "Economic Analysis of Federal Regulations Under Executive Order 12866," *Executive Office of the President, Office of Management and Budget,* pp. 1-37, and "Report to the President on Executive Order No. 12866," Regulatory Planning and Review, May 1, 1994, *Office of Information and Regulatory Affairs, Office of Management and Budget.* Prior presidents signed similar orders as discussed in "Federal Agency Valuations of Human life," *Administrative Conference of the United States, Report for Recommendation 88-7, December 1988,* pp. 368-408. 7911

SUMMARY OF LOSSES FOR [redacted]

TABLE	DESCRIPTION	ESTIMATE
	EARNINGS	
	LOSS OF WAGES & BENEFITS	
3	Full-Time Employment to age 67	$3,204,353
	OFFSET OF WAGES BENEFITS	
6	Employment to age 67	($ 349,180)
	NET WAGES & BENEFITS LOSS	
3-6	Employment to age 67	$2,855,173)
	PRESENT VALUE OF FUTURE COUNSELING COSTS	
7	COST OF FUTURE TREATMENT AND COUNSELING COSTS	$ 512,681
	LOSS OF ENJOYMENT OF LIFE	
10	REDUCTION IN VALUE OF LIFE	$8,886,300

The information on this Summary of Losses is intended to summarize losses under certain given assumptions. Please refer to the report and the tables for all the opinions.

Table 1
PRESENT VALUE OF FUTURE WAGES
2011-2070

YEAR	AGE	WAGES	DISCOUNT FACTOR	PRESENT VALUE	CUMULATE
2011	22	$19,215	0.95209	$18,294	$18,294
2012	23	40,566	0.93664	37,996	56,290
2013	24	42,937	0.92143	39,563	95,853
2014	25	45,447	0.90647	41,196	137,049
2015	26	48,104	0.89176	42,897	179,946
2016	27	50,916	0.87729	44,668	224,614
2017	28	53,893	0.86305	46,512	271,126
2018	29	57,044	0.84904	48,433	319,559
2019	30	60,379	0.83525	50,432	369,991
2020	31	63,909	0.82170	52,514	422,505
2021	32	67,645	0.80836	54,682	477,187
2022	33	71,600	0.79524	56,939	534,126
2023	34	75,786	0.78233	59,290	593,416
2024	35	80,216	0.76963	61,737	655,153
2025	36	81,138	0.75714	61,433	716,586
2026	37	82,071	0.74485	61,131	777,717
2027	38	83,015	0.73276	60,830	838,547
2028	39	83,970	0.72086	60,531	899,078
2029	40	84,936	0.70916	60,233	959,311
2030	41	85,913	0.69765	59,937	1,019,248
2031	42	86,901	0.68633	59,643	1,078,891
2032	43	87,900	0.67519	59,349	1,138,240
2033	44	88,911	0.66423	59,057	1,197,297
2034	45	89,933	0.65344	58,766	1,256,063
2035	46	90,967	0.64284	58,477	1,314,540
2036	47	92,013	0.63240	58,189	1,372,729
2037	48	93,071	0.62214	57,903	1,430,632
2038	49	94,141	0.61204	57,618	1,488,250
2039	50	95,224	0.60210	57,334	1,545,584
2040	51	96,319	0.59233	57,053	1,602,637
2041	52	97,427	0.58272	56,773	1,659,410
2042	53	98,547	0.57326	56,493	1,715,903
2043	54	99,680	0.56395	56,215	1,772,118
2044	55	100,826	0.55480	55,938	1,828,056
2045	56	101,985	0.54579	55,662	1,883,718
2046	57	103,158	0.53693	55,389	1,939,107
2047	58	104,344	0.52822	55,117	1,994,224
2048	59	105,544	0.51964	54,845	2,049,069
2049	60	106,758	0.51121	54,576	2,103,645
2050	61	107,986	0.50291	54,307	2,157,952
2051	62	109,228	0.49475	54,041	2,211,993
2052	63	110,484	0.48672	53,775	2,265,768
2053	64	111,755	0.47882	53,511	2,319,279
2054	65	113,040	0.47104	53,246	2,372,525
2055	66	114,340	0.46340	52,985	2,425,510
2056	67	115,655	0.45587	52,724	2,478,234
2057	68	116,985	0.44847	52,464	2,530,698
2058	69	118,330	0.44120	52,207	2,582,905
2059	70	119,691	0.43403	51,949	2,634,854
2060	71	121,067	0.42699	51,694	2,686,548
2061	72	122,459	0.42006	51,440	2,737,988
2062	73	123,867	0.41324	51,187	2,789,175
2063	74	125,291	0.40653	50,935	2,840,110
2064	75	126,732	0.39993	50,684	2,890,794
2065	76	128,189	0.39344	50,435	2,941,229
2066	77	129,663	0.38705	50,186	2,991,415
2067	78	131,154	0.38077	49,940	3,041,355
2068	79	132,662	0.37459	49,694	3,091,049
2069	80	134,188	0.36851	49,450	3,140,499
2070	81	128,666	0.36284	46,685	$3,187,184
[redacted]				$3,187,184	

Table 2

PRESENT VALUE OF FUTURE EMPLOYEE BENEFITS

2011-2070

YEAR	AGE	EMPLOYEE BENEFITS	DISCOUNT FACTOR	PRESENT VALUE	CUMULATE
2011	22	$5,630	0.95209	$5,360	$5,360
2012	23	11,886	0.93864	11,133	16,493
2013	24	12,581	0.92143	11,593	28,086
2014	25	13,316	0.90647	12,071	40,157
2015	26	14,094	0.89176	12,568	52,725
2016	27	14,918	0.87729	13,087	65,812
2017	28	15,791	0.86305	13,628	79,440
2018	29	16,714	0.84904	14,191	93,631
2019	30	17,691	0.83525	14,776	108,407
2020	31	18,725	0.82170	15,386	123,793
2021	32	19,820	0.80836	16,022	139,815
2022	33	20,979	0.79524	16,683	156,498
2023	34	22,205	0.78233	17,372	173,870
2024	35	23,503	0.76963	18,089	191,959
2025	36	23,773	0.75714	17,999	209,958
2026	37	24,047	0.74485	17,911	227,869
2027	38	24,323	0.73276	17,823	245,692
2028	39	24,603	0.72086	17,735	263,427
2029	40	24,886	0.70916	17,648	281,075
2030	41	25,173	0.69765	17,562	298,637
2031	42	25,462	0.68633	17,475	316,112
2032	43	25,755	0.67519	17,390	333,502
2033	44	26,051	0.66423	17,304	350,806
2034	45	26,350	0.65344	17,218	368,024
2035	46	26,653	0.64284	17,134	385,158
2036	47	26,960	0.63240	17,050	402,208
2037	48	27,270	0.62214	16,966	419,174
2038	49	27,583	0.61204	16,882	436,056
2039	50	27,901	0.60210	16,799	452,855
2040	51	28,221	0.59233	16,716	469,571
2041	52	28,546	0.58272	16,634	486,205
2042	53	28,874	0.57326	16,552	502,757
2043	54	29,206	0.56395	16,471	519,228
2044	55	29,542	0.55480	16,390	535,618
2045	56	29,882	0.54579	16,309	551,927
2046	57	30,225	0.53693	16,229	568,156
2047	58	30,573	0.52822	16,149	584,305
2048	59	30,924	0.51964	16,069	600,374
2049	60	31,280	0.51121	15,991	616,365
2050	61	31,640	0.50291	15,912	632,277
2051	62	32,004	0.49475	15,834	648,111
2052	63	32,372	0.48672	15,756	663,867
2053	64	32,744	0.47882	15,678	679,545
2054	65	33,121	0.47104	15,601	695,146
2055	66	33,502	0.46340	15,525	710,671
2056	67	33,887	0.45587	15,448	726,119
2057	68	34,277	0.44847	15,372	741,491
2058	69	34,671	0.44120	15,297	756,788
2059	70	35,069	0.43403	15,221	772,009
2060	71	35,473	0.42699	15,147	787,156
2061	72	35,880	0.42006	15,072	802,228
2062	73	36,293	0.41324	14,998	817,226
2063	74	36,710	0.40653	14,924	832,150
2064	75	37,132	0.39993	14,850	847,000
2065	76	37,559	0.39344	14,777	861,777
2066	77	37,991	0.38705	14,704	876,481
2067	78	38,428	0.38077	14,632	891,113
2068	79	38,870	0.37459	14,560	905,673
2069	80	39,317	0.36851	14,489	920,162
2070	81	37,699	0.36284	13,679	$933,841
[redacted]				$933,841	

Table 3

PRESENT VALUE OF NET WAGE AND BENEFIT LOSS

2011-2070

YEAR	AGE	WAGES	EMPLOYEE BENEFITS	TOTAL	CUMULATE
2011	22	$18,294	$5,360	$23,654	$23,654
2012	23	37,996	11,133	49,129	72,783
2013	24	39,563	11,593	51,156	123,939
2014	25	41,196	12,071	53,267	177,206
2015	26	42,897	12,568	55,465	232,671
2016	27	44,668	13,087	57,755	290,426
2017	28	46,512	13,628	60,140	350,566
2018	29	48,433	14,191	62,624	413,190
2019	30	50,432	14,776	65,208	478,398
2020	31	52,514	15,386	67,900	546,298
2021	32	54,682	16,022	70,704	617,002
2022	33	56,939	16,683	73,622	690,624
2023	34	59,290	17,372	76,662	767,286
2024	35	61,737	18,089	79,826	847,112
2025	36	61,433	17,999	79,432	926,544
2026	37	61,131	17,911	79,042	1,005,586
2027	38	60,830	17,823	78,653	1,084,239
2028	39	60,531	17,735	78,266	1,162,505
2029	40	60,233	17,648	77,881	1,240,386
2030	41	59,937	17,562	77,499	1,317,885
2031	42	59,643	17,475	77,118	1,395,003
2032	43	59,349	17,390	76,739	1,471,742
2033	44	59,057	17,304	76,361	1,548,103
2034	45	58,766	17,218	75,984	1,624,087
2035	46	58,477	17,134	75,611	1,699,698
2036	47	58,189	17,050	75,239	1,774,937
2037	48	57,903	16,966	74,869	1,849,806
2038	49	57,618	16,882	74,500	1,924,306
2039	50	57,334	16,799	74,133	1,998,439
2040	51	57,053	16,716	73,769	2,072,208
2041	52	56,773	16,634	73,407	2,145,615
2042	53	56,493	16,552	73,045	2,218,660
2043	54	56,215	16,471	72,686	2,291,346
2044	55	55,938	16,390	72,328	2,363,674
2045	56	55,662	16,309	71,971	2,435,645
2046	57	55,389	16,229	71,618	2,507,263
2047	58	55,117	16,149	71,266	2,578,529
2048	59	54,845	16,069	70,914	2,649,443
2049	60	54,576	15,991	70,567	2,720,010
2050	61	54,307	15,912	70,219	2,790,229
2051	62	54,041	15,834	69,875	2,860,104
2052	63	53,775	15,756	69,531	2,929,635
2053	64	53,511	15,678	69,189	2,998,824
2054	65	53,246	15,601	68,847	3,067,671
2055	66	52,985	15,525	68,510	3,136,181
2056	67	52,724	15,448	68,172	3,204,353
2057	68	52,464	15,372	67,836	3,272,189
2058	69	52,207	15,297	67,504	3,339,693
2059	70	51,949	15,221	67,170	3,406,863
2060	71	51,694	15,147	66,841	3,473,704
2061	72	51,440	15,072	66,512	3,540,216
2062	73	51,187	14,998	66,185	3,606,401
2063	74	50,935	14,924	65,859	3,672,260
2064	75	50,684	14,850	65,534	3,737,794
2065	76	50,435	14,777	65,212	3,803,006
2066	77	50,186	14,704	64,890	3,867,896
2067	78	49,940	14,632	64,572	3,932,468
2068	79	49,694	14,560	64,254	3,996,722
2069	80	49,450	14,489	63,939	4,060,661
2070	81	46,685	13,679	60,364	$4,121,025
[redacted]		$3,187,184	$933,841	$4,121,025	

Table 4
PRESENT VALUE OF FUTURE OFFSET WAGES
2009-2070

YEAR	AGE	WAGES	DISCOUNT FACTOR	PRESENT VALUE	CUMULATE
2009	20	$7,800	0.98377	$7,673	$7,673
2010	21	7,890	0.96780	7,636	15,309
2011	22	7,981	0.95209	7,599	22,908
2012	23	8,073	0.93664	7,561	30,469
2013	24	8,166	0.92143	7,524	37,993
2014	25	8,260	0.90647	7,487	45,480
2015	26	8,355	0.89176	7,451	52,931
2016	27	8,451	0.87729	7,414	60,345
2017	28	8,548	0.86305	7,377	67,722
2018	29	8,646	0.84904	7,341	75,063
2019	30	8,745	0.83525	7,304	82,367
2020	31	8,846	0.82170	7,269	89,636
2021	32	8,948	0.80836	7,233	96,869
2022	33	9,051	0.79524	7,198	104,067
2023	34	9,155	0.78233	7,162	111,229
2024	35	9,260	0.76963	7,127	118,356
2025	36	9,366	0.75714	7,091	125,447
2026	37	9,474	0.74485	7,057	132,504
2027	38	9,583	0.73276	7,022	139,526
2028	39	9,693	0.72086	6,987	146,513
2029	40	9,804	0.70916	6,953	153,466
2030	41	9,917	0.69765	6,919	160,385
2031	42	10,031	0.68633	6,885	167,270
2032	43	10,146	0.67519	6,850	174,120
2033	44	10,263	0.66423	6,817	180,937
2034	45	10,381	0.65344	6,783	187,720
2035	46	10,500	0.64284	6,750	194,470
2036	47	10,621	0.63240	6,717	201,187
2037	48	10,743	0.62214	6,684	207,871
2038	49	10,867	0.61204	6,651	214,522
2039	50	10,992	0.60210	6,618	221,140
2040	51	11,118	0.59233	6,586	227,726
2041	52	11,246	0.58272	6,553	234,279
2042	53	11,375	0.57326	6,521	240,800
2043	54	11,506	0.56395	6,489	247,289
2044	55	11,638	0.55480	6,457	253,746
2045	56	11,772	0.54579	6,426	260,171
2046	57	11,907	0.53693	6,393	266,564
2047	58	12,044	0.52822	6,362	272,926
2048	59	12,183	0.51964	6,331	279,257
2049	60	12,323	0.51121	6,300	285,557
2050	61	12,465	0.50291	6,269	291,826
2051	62	12,608	0.49475	6,238	298,064
2052	63	12,753	0.48672	6,207	304,271
2053	64	12,900	0.47882	6,177	310,448
2054	65	13,048	0.47104	6,146	316,594
2055	66	13,198	0.46340	6,116	322,710
2056	67	13,350	0.45587	6,086	328,796
2057	68	13,504	0.44847	6,056	334,852
2058	69	13,659	0.44120	6,026	340,878
2059	70	13,816	0.43403	5,997	346,875
2060	71	13,975	0.42699	5,967	352,842
2061	72	14,136	0.42006	5,938	358,780
2062	73	14,299	0.41324	5,909	364,689
2063	74	14,463	0.40653	5,880	370,569
2064	75	14,629	0.39993	5,851	376,420
2065	76	14,797	0.39344	5,822	382,242
2066	77	14,967	0.38705	5,793	388,035
2067	78	15,139	0.38077	5,764	393,799
2068	79	15,313	0.37459	5,736	399,535
2069	80	15,489	0.36851	5,708	405,243
2070	81	14,852	0.36284	5,389	$410,632
[redacted]				$410,632	

Table 5

PRESENT VALUE OF FUTURE OFFSET EMPLOYEE BENEFITS

2009-2070

YEAR	AGE	EMPLOYEE BENEFITS	DISCOUNT FACTOR	PRESENT VALUE	CUMULATE
2009	20	$484	0.98377	$476	$476
2010	21	489	0.96780	473	949
2011	22	495	0.95209	471	1,420
2012	23	501	0.93664	469	1,889
2013	24	506	0.92143	466	2,355
2014	25	512	0.90647	464	2,819
2015	26	518	0.89176	462	3,281
2016	27	524	0.87729	460	3,741
2017	28	530	0.86305	457	4,198
2018	29	536	0.84904	455	4,653
2019	30	542	0.83525	453	5,106
2020	31	548	0.82170	450	5,556
2021	32	555	0.80836	449	6,005
2022	33	561	0.79524	446	6,451
2023	34	568	0.78233	444	6,895
2024	35	574	0.76963	442	7,337
2025	36	581	0.75714	440	7,777
2026	37	587	0.74485	437	8,214
2027	38	594	0.73276	435	8,649
2028	39	601	0.72086	433	9,082
2029	40	608	0.70916	431	9,513
2030	41	615	0.69765	429	9,942
2031	42	622	0.68633	427	10,369
2032	43	629	0.67519	425	10,794
2033	44	636	0.66423	422	11,216
2034	45	644	0.65344	421	11,637
2035	46	651	0.64284	418	12,055
2036	47	659	0.63240	417	12,472
2037	48	666	0.62214	414	12,886
2038	49	674	0.61204	413	13,299
2039	50	682	0.60210	411	13,710
2040	51	689	0.59233	408	14,118
2041	52	697	0.58272	406	14,524
2042	53	705	0.57326	404	14,928
2043	54	713	0.56395	402	15,330
2044	55	722	0.55480	401	15,731
2045	56	730	0.54579	398	16,129
2046	57	738	0.53693	396	16,525
2047	58	747	0.52822	395	16,920
2048	59	755	0.51964	392	17,312
2049	60	764	0.51121	391	17,703
2050	61	773	0.50291	389	18,092
2051	62	782	0.49475	387	18,479
2052	63	791	0.48672	385	18,864
2053	64	800	0.47882	383	19,247
2054	65	809	0.47104	381	19,628
2055	66	818	0.46340	379	20,007
2056	67	828	0.45587	377	20,384
2057	68	837	0.44847	376	20,759
2058	69	847	0.44120	374	21,133
2059	70	857	0.43403	372	21,505
2060	71	866	0.42699	370	21,875
2061	72	876	0.42006	368	22,243
2062	73	887	0.41324	367	22,610
2063	74	897	0.40653	365	22,975
2064	75	907	0.39993	363	23,338
2065	76	917	0.39344	361	23,699
2066	77	928	0.38705	359	24,058
2067	78	939	0.38077	358	24,416
2068	79	949	0.37459	355	24,771
2069	80	960	0.36851	354	25,125
2070	81	921	0.36284	334	$25,459
[redacted]				$25,459	

Table 6

PRESENT VALUE OF NET OFFSET WAGES AND BENEFITS

2009-2070

YEAR	AGE	WAGES	EMPLOYEE BENEFITS	TOTAL	CUMULATE
2009	20	$7,673	$476	$8,149	$8,149
2010	21	7,636	473	8,109	16,258
2011	22	7,599	471	8,070	24,328
2012	23	7,561	469	8,030	32,358
2013	24	7,524	466	7,990	40,348
2014	25	7,487	464	7,951	48,299
2015	26	7,451	462	7,913	56,212
2016	27	7,414	460	7,874	64,086
2017	28	7,377	457	7,834	71,920
2018	29	7,341	455	7,796	79,716
2019	30	7,304	453	7,757	87,473
2020	31	7,269	450	7,719	95,192
2021	32	7,233	449	7,682	102,874
2022	33	7,198	446	7,644	110,518
2023	34	7,162	444	7,606	118,124
2024	35	7,127	442	7,569	125,693
2025	36	7,091	440	7,531	133,224
2026	37	7,057	437	7,494	140,718
2027	38	7,022	435	7,457	148,175
2028	39	6,987	433	7,420	155,595
2029	40	6,953	431	7,384	162,979
2030	41	6,919	429	7,348	170,327
2031	42	6,885	427	7,312	177,639
2032	43	6,850	425	7,275	184,914
2033	44	6,817	422	7,239	192,153
2034	45	6,783	421	7,204	199,357
2035	46	6,750	418	7,168	206,525
2036	47	6,717	417	7,134	213,659
2037	48	6,684	414	7,098	220,757
2038	49	6,651	413	7,064	227,821
2039	50	6,618	411	7,029	234,850
2040	51	6,586	408	6,994	241,844
2041	52	6,553	406	6,959	248,803
2042	53	6,521	404	6,925	255,728
2043	54	6,489	402	6,891	262,619
2044	55	6,457	401	6,858	269,477
2045	56	6,425	398	6,823	276,300
2046	57	6,393	396	6,789	283,089
2047	58	6,362	395	6,757	289,846
2048	59	6,331	392	6,723	296,569
2049	60	6,300	391	6,691	303,260
2050	61	6,269	389	6,658	309,918
2051	62	6,238	387	6,625	316,543
2052	63	6,207	385	6,592	323,135
2053	64	6,177	383	6,560	329,695
2054	65	6,146	381	6,527	336,222
2055	66	6,116	379	6,495	342,717
2056	67	6,086	377	6,463	349,180
2057	68	6,056	375	6,431	355,611
2058	69	6,026	374	6,400	362,011
2059	70	5,997	372	6,369	368,380
2060	71	5,967	370	6,337	374,717
2061	72	5,938	368	6,306	381,023
2062	73	5,909	367	6,276	387,299
2063	74	5,880	365	6,245	393,544
2064	75	5,851	363	6,214	399,758
2065	76	5,822	361	6,183	405,941
2066	77	5,793	359	6,152	412,093
2067	78	5,764	358	6,122	418,215
2068	79	5,736	355	6,091	424,306
2069	80	5,708	354	6,062	430,368
2070	81	5,389	334	5,723	$436,091
[redacted]		$410,632	$25,459	$436,091	

Table 7

PRESENT VALUE OF FUTURE TREATMENT AND COUNSELING COSTS

2009-2070

YEAR	AGE	LIFE CARE	DISCOUNT FACTOR	PRESENT VALUE	CUMULATE
2009	20	$9,739	0.98377	$9,581	$9,581
2010	21	9,851	0.96780	9,534	19,115
2011	22	9,964	0.95209	9,487	28,602
2012	23	10,079	0.93664	9,440	38,042
2013	24	10,195	0.92143	9,394	47,436
2014	25	10,312	0.90647	9,348	56,784
2015	26	10,431	0.89176	9,302	66,086
2016	27	10,551	0.87729	9,256	75,342
2017	28	10,672	0.86305	9,210	84,552
2018	29	10,795	0.84904	9,166	93,717
2019	30	10,919	0.83525	9,120	102,837
2020	31	11,045	0.82170	9,076	111,913
2021	32	11,172	0.80836	9,031	120,944
2022	33	11,300	0.79524	8,986	129,930
2023	34	11,430	0.78233	8,942	138,872
2024	35	11,561	0.76963	8,898	147,770
2025	36	11,694	0.75714	8,854	156,624
2026	37	11,828	0.74485	8,810	165,434
2027	38	11,964	0.73276	8,767	174,201
2028	39	12,102	0.72086	8,724	182,925
2029	40	12,241	0.70916	8,681	191,606
2030	41	12,382	0.69765	8,638	200,244
2031	42	12,524	0.68633	8,596	208,840
2032	43	12,668	0.67519	8,553	217,393
2033	44	12,814	0.66423	8,511	225,904
2034	45	12,961	0.65344	8,469	234,373
2035	46	13,110	0.64284	8,428	242,801
2036	47	13,261	0.63240	8,386	251,187
2037	48	13,414	0.62214	8,345	259,532
2038	49	13,568	0.61204	8,304	267,836
2039	50	13,724	0.60210	8,263	276,099
2040	51	13,882	0.59233	8,223	284,322
2041	52	14,042	0.58272	8,183	292,505
2042	53	14,203	0.57326	8,142	300,647
2043	54	14,366	0.56395	8,102	308,749
2044	55	14,531	0.55480	8,062	316,811
2045	56	14,698	0.54579	8,022	324,833
2046	57	14,867	0.53693	7,983	332,816
2047	58	15,038	0.52822	7,943	340,759
2048	59	15,211	0.51964	7,904	348,663
2049	60	15,386	0.51121	7,865	356,528
2050	61	15,563	0.50291	7,827	364,355
2051	62	15,742	0.49475	7,788	372,143
2052	63	15,923	0.48672	7,750	379,893
2053	64	16,106	0.47882	7,712	387,605
2054	65	16,291	0.47104	7,674	395,279
2055	66	16,478	0.46340	7,636	402,915
2056	67	16,667	0.45587	7,598	410,513
2057	68	16,859	0.44847	7,561	418,074
2058	69	17,053	0.44120	7,524	425,598
2059	70	17,249	0.43403	7,487	433,085
2060	71	17,447	0.42699	7,450	440,535
2061	72	17,648	0.42006	7,413	447,948
2062	73	17,851	0.41324	7,377	455,325
2063	74	18,056	0.40653	7,340	462,665
2064	75	18,264	0.39993	7,304	469,969
2065	76	18,474	0.39344	7,268	477,237
2066	77	18,686	0.38705	7,232	484,469
2067	78	18,901	0.38077	7,197	491,666
2068	79	19,118	0.37459	7,161	498,827
2069	80	19,338	0.36851	7,126	505,953
2070	81	18,542	0.36284	6,728	$512,681
[redacted]				$512,681	

Table 8
LOSS OF PAST RVL OF [redacted]
1999-2008

YEAR	AGE	RVL	CUMULATE
******	*****	*********	**********
1999	10	$142,362	$142,362
2000	11	147,189	289,551
2001	12	149,470	439,021
2002	13	153,027	592,048
2003	14	155,904	747,952
2004	15	160,987	908,939
2005	16	166,492	1,075,431
2006	17	170,721	1,246,152
2007	18	177,687	1,423,839
2008	19	183,017	$1,606,856
[redacted]		$1,606,856	

Table 9
PRESENT VALUE OF FUTURE RVL OF [redacted]
2009-2070

YEAR	AGE	RVL	DISCOUNT FACTOR	PRESENT VALUE	CUMULATE
2009	20	$188,508	0.98377	$185,449	$185,449
2010	21	188,508	0.96780	182,438	367,887
2011	22	188,508	0.95209	179,477	547,364
2012	23	188,508	0.93664	176,564	723,928
2013	24	188,508	0.92143	173,697	897,625
2014	25	188,508	0.90647	170,877	1,068,502
2015	26	188,508	0.89176	168,104	1,236,606
2016	27	188,508	0.87729	165,376	1,401,982
2017	28	188,508	0.86305	162,692	1,564,674
2018	29	188,508	0.84904	160,051	1,724,725
2019	30	188,508	0.83525	157,451	1,882,176
2020	31	188,508	0.82170	154,897	2,037,073
2021	32	188,508	0.80836	152,382	2,189,455
2022	33	188,508	0.79524	149,909	2,339,364
2023	34	188,508	0.78233	147,475	2,486,839
2024	35	188,508	0.76963	145,081	2,631,920
2025	36	188,508	0.75714	142,727	2,774,647
2026	37	188,508	0.74485	140,410	2,915,057
2027	38	188,508	0.73276	138,131	3,053,188
2028	39	188,508	0.72086	135,888	3,189,076
2029	40	188,508	0.70916	133,682	3,322,758
2030	41	188,508	0.69765	131,513	3,454,271
2031	42	188,508	0.68633	129,379	3,583,650
2032	43	188,508	0.67519	127,279	3,710,929
2033	44	188,508	0.66423	125,213	3,836,142
2034	45	188,508	0.65344	123,179	3,959,321
2035	46	188,508	0.64284	121,180	4,080,501
2036	47	188,508	0.63240	119,212	4,199,713
2037	48	188,508	0.62214	117,278	4,316,991
2038	49	188,508	0.61204	115,374	4,432,365
2039	50	188,508	0.60210	113,501	4,545,866
2040	51	188,508	0.59233	111,659	4,657,525
2041	52	188,508	0.58272	109,847	4,767,372
2042	53	188,508	0.57326	108,064	4,875,436
2043	54	188,508	0.56395	106,309	4,981,745
2044	55	188,508	0.55480	104,584	5,086,329
2045	56	188,508	0.54579	102,886	5,189,215
2046	57	188,508	0.53693	101,216	5,290,431
2047	58	188,508	0.52822	99,574	5,390,005
2048	59	188,508	0.51964	97,956	5,487,961
2049	60	188,508	0.51121	96,367	5,584,328
2050	61	188,508	0.50291	94,803	5,679,131
2051	62	188,508	0.49475	93,264	5,772,395
2052	63	188,508	0.48672	91,751	5,864,146
2053	64	188,508	0.47882	90,261	5,954,407
2054	65	188,508	0.47104	88,795	6,043,202
2055	66	188,508	0.46340	87,355	6,130,557
2056	67	188,508	0.45587	85,935	6,216,492
2057	68	188,508	0.44847	84,540	6,301,032
2058	69	188,508	0.44120	83,170	6,384,202
2059	70	188,508	0.43403	81,818	6,466,020
2060	71	188,508	0.42699	80,491	6,546,511
2061	72	188,508	0.42006	79,185	6,625,696
2062	73	188,508	0.41324	77,899	6,703,595
2063	74	188,508	0.40653	76,634	6,780,229
2064	75	188,508	0.39993	75,390	6,855,619
2065	76	188,508	0.39344	74,167	6,929,786
2066	77	188,508	0.38705	72,962	7,002,748
2067	78	188,508	0.38077	71,778	7,074,526
2068	79	188,508	0.37459	70,613	7,145,139
2069	80	188,508	0.36851	69,467	7,214,606
2070	81	178,695	0.36284	64,838	$7,279,444
[redacted]				$7,279,444	

Table 10
PRESENT VALUE OF NET RVL OF [redacted]
1999-2070

YEAR	AGE	RVL	CUMULATE
1999	10	$142,362	$142,362
2000	11	147,189	289,551
2001	12	149,470	439,021
2002	13	153,027	592,048
2003	14	155,904	747,952
2004	15	160,987	908,939
2005	16	166,492	1,075,431
2006	17	170,721	1,246,152
2007	18	177,687	1,423,839
2008	19	183,017	1,606,856
2009	20	185,449	1,792,305
2010	21	182,438	1,974,743
2011	22	179,477	2,154,220
2012	23	176,564	2,330,784
2013	24	173,697	2,504,481
2014	25	170,877	2,675,358
2015	26	168,104	2,843,462
2016	27	165,376	3,008,838
2017	28	162,692	3,171,530
2018	29	160,051	3,331,581
2019	30	157,451	3,489,032
2020	31	154,897	3,643,929
2021	32	152,382	3,796,311
2022	33	149,909	3,946,220
2023	34	147,475	4,093,695
2024	35	145,081	4,238,776
2025	36	142,727	4,381,503
2026	37	140,410	4,521,913
2027	38	138,131	4,660,044
2028	39	135,888	4,795,932

2029	40	133,682	4,929,614
2030	41	131,513	5,061,127
2031	42	129,379	5,190,506
2032	43	127,279	5,317,785
2033	44	125,213	5,442,998
2034	45	123,179	5,566,177
2035	46	121,180	5,687,357
2036	47	119,212	5,806,569
2037	48	117,278	5,923,847
2038	49	115,374	6,039,221
2039	50	113,501	6,152,722
2040	51	111,659	6,264,381
2041	52	109,847	6,374,228
2042	53	108,064	6,482,292
2043	54	106,309	6,588,601
2044	55	104,584	6,693,185
2045	56	102,886	6,796,071
2046	57	101,216	6,897,287
2047	58	99,574	6,996,861
2048	59	97,956	7,094,817
2049	60	96,367	7,191,184
2050	61	94,803	7,285,987
2051	62	93,264	7,379,251
2052	63	91,751	7,471,002
2053	64	90,261	7,561,263
2054	65	88,795	7,650,058
2055	66	87,355	7,737,413
2056	67	85,935	7,823,348
2057	68	84,540	7,907,888
2058	69	83,170	7,991,058
2059	70	81,818	8,072,876
2060	71	80,491	8,153,367
2061	72	79,185	8,232,552
2062	73	77,899	8,310,451
2063	74	76,634	8,387,085

2064	75	75,390	8,462,475
2065	76	74,167	8,536,642
2066	77	72,962	8,609,604
2067	78	71,778	8,681,382
2068	79	70,613	8,751,995
2069	80	69,467	8,821,462
2070	81	64,838	$8,886,300
[redacted]		$8,886,300	

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

From: Larisa Mitcham
To: Victim Notification System
Subject: US Department of Justice Victim Notification System
Date: Monday, June 22, 2009 4:26:21 PM

DO NOT REPLY TO THIS EMAIL.

U.S. Department of Justice
United States Attorney's Office
Eastern District of Texas in Tyler
110 N. College
Ste. 700
Tyler, TX 75702
Phone: 18008043547
Fax: (903) 590-1439

June 22, 2009

James Marsh, Attorney
14525 S.W. Milliken Way
Suite 100
Beaverton, OR 97005

RE: United States v. Defendant(s) Doyle Randall Paroline Case Number 2008R00609 and Court Docket Number 08-CR-00061-6

Dear James Marsh, Attorney:

The United States Department of Justice believes it is important to keep victims of federal crime informed of court proceedings. You have been identified to receive notifications for [redacted] This notice provides information about the above-referenced criminal case.

Defendant Doyle Randall Paroline was sentenced by the Court. Court ordered the defendant to the following:

Incarceration of 24 month(s)
Followed by Supervised Release of 10 year(s)
Special Assessment of $100.00.
Fine of $0.00.

The Court further ordered the following special condition(s): Sex Offender Treatment.

The Victim Notification System (VNS) is designed to provide you with information regarding the case as it proceeds through the criminal justice system. You may obtain current information about this case on the VNS Web site at https://www.notify.usdoj.gov or from the VNS Call Center at 1-866-DOJ-4YOU (1-866-365-4968) (TDD/TTY: 1-866-228-4619) (International: 1-502-213-2767). In addition, you may use the Call Center or Internet to update your contact information and/or change your decision about participation in the notification program. If you update your information to include a current email address, VNS will send information to that address. In order to continue to receive notifications, it is your responsibility to keep your contact information current.

You will use your Victim Identification Number (VIN) [redacted] and Personal Identification Number (PIN) [redacted] anytime you contact the Call Center and the first time you log on to the VNS web site. In addition, the first time you access the VNS Internet site, you will be prompted to enter your last name (or

business name) as currently contained in VNS. The name you should enter is [redacted]

Remember, VNS is an automated system and cannot answer questions. If you have other questions which involve this matter, please contact this office at the number listed above.

Sincerely,
JOHN M. BALES
United States Attorney

Becky Smith
Victim Witness Coordinator

If you do not want to receive email notifications from the Victim Notification System (VNS) or wish to no longer participate in the Department of Justice victim notification program, please log into the VNS Web site at https://www.notify.usdoj.gov. To stop receiving email notifications or change your email address select My Information and either remove your email address or provide a new address and click the "update" button. If you no longer wish to receive notifications in your case or access the VNS Web site and toll free telephone service, select Stop Receiving Notifications and follow the instructions on the screen.

If you believe you have received this email in error, please contact the office listed at top of the email message.

Please note, if this is the first notification you have received from VNS you will need to wait 4-8 hours from receipt of this email before you can login to the

VNS Internet site (http://www.notify.usdoj.gov). In addition, it will also be 4-8 hours before any documents which may have been uploaded to VNS as part of this notification will available under the "Documents/ Links" section on the Web page.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

[SEAL]

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

JAMES C. DUFF
Director

JILL C. SAYENGA
Deputy Director

WILLIAM R. BURCHILL, JR.
Associate Director
and General Counsel

ROBERT K. LOESCHE
Deputy General Counsel

August 17, 2009

Mr. David J. Maland
Clerk
United States District Court
106 William M. Steger Federal Building
and United States Courthouse
211 West Ferguson Street
Tyler, TX 75702

Dear Mr. Maland:

I am responding to your inquiry concerning a restitution request under 18 U.S.C. § 2259 by James Marsh, an attorney for an alleged victim depicted in child pornography that was distributed approximately ten years ago. Mr. Marsh has filed restitution requests similar to this one in approximately thirty judicial districts. He made each request after he identified defendants who were potentially liable to pay restitution because they had downloaded his

client's image and were thereafter convicted of pornography possession offenses. While Mr. Marsh has advanced on his client's behalf restitution requests seeking to have all defendants convicted of possessing the pornography to be declared jointly and severally liable with the original pornography distributor, the government has declined to endorse Mr. Marsh's position. If Mr. Marsh prevails, an attempt to frame the type of order he seeks would involve duplicative fact-finding in multiple districts involving the same victim and similar crimes. Managing such restitution awards would prove onerous. In light of these obstacles, you ask whether (1) joint and several liability may be imposed against offenders in multiple districts as Mr. Marsh proposed; (2) there are measures that could assist clerks in administering multiple joint and several liability in diverse districts; (3) transfer to one venue for coordinated fact-finding is possible in order to minimize duplicative effort; and (4) 18 U.S.C. § 2259 precludes the sort of global open-ended restitution awards that Mr. Marsh requests on behalf of his client.[1]

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[1] On June 10, 2009, District Judge Leonard Davis ordered all parties to submit briefs concerning a variety of issues involving the restitution request addressed to defendant Doyle Randall Paroline. The court also invited any other party, including the Administrative Office of the United States Courts ("AO"), to file briefs in the case. 28 U.S.C. § 607 provides that "[a]n officer or employee of the Administrative Office shall not engage directly or indirectly in the practice of law in any court of the United States." This precludes me from filing a brief, but I may provide you with legal advice that may coincidentally be

(Continued on following page)

1. Joint and Several Liability Under 18 U.S.C. § 2259

Section 2259 does not expressly authorize apportionment and joint and several liability, but it does incorporate all general restitution provisions in 18 U.S.C. § 3664.[2] Section 3664(h) of the Mandatory

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beneficial to the court. My legal advice simply represents my judgment concerning statutory and case law authority. This letter hereafter refers to the arguments of the victim advocacy groups that have filed briefs in this matter as "the victim's advocates."

[2] Section 2259 states:

> **(a)** In general. – Notwithstanding section 3663 or 3663A, and in addition to any other civil or criminal penalty authorized by law, the court shall order restitution for any offense under this chapter.
>
> **(b)** Scope and nature of order. –
>
> **(1)** Directions. – The order of restitution under this section shall direct the defendant to pay the victim (through the appropriate court mechanism) the full amount of the victim's losses as determined by the court pursuant to paragraph (2).
>
> **(2)** *Enforcement. – An order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A.*
>
> **(3)** Definition. – For purposes of this subsection, the term "full amount of the victim's losses" includes any costs incurred by the victim for –
>
> **(A)** medical services relating to physical, psychiatric, or psychological care;
>
> **(B)** physical and occupational therapy or rehabilitation;

(Continued on following page)

Victim Restitution Act[3] ("MVRA") provides that "the court may make each defendant liable for payment of the full amount of restitution or may apportion

---

(C) necessary transportation, temporary housing, and child care expenses;

(D) lost income;

(E) attorneys' fees, as well as other costs incurred; and

(F) any other losses suffered by the victim *as a proximate result of the offense.*

(4) Order mandatory. –

(A) The issuance of a restitution order under this section is mandatory.

(B) A court may not decline to issue an order under this section because of –

(I) the economic circumstances of the defendant; or

(ii) the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source.

(c) Definition. – For purposes of this section, the term "victim" means the individual harmed as a result of a commission of a crime under this chapter, including, in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, but in no event shall the defendant be named as such representative or guardian.

18 U.S.C. § 2259 (emphasis added).

[3] Title II, subtitle A of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1227 (April 24, 1996).

liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant." 18 U.S.C. § 3664(h). This subsection does not directly refer to "joint and several liability,"[4] but integrates that doctrine by giving courts the option of making each defendant who inflicted compensable harm liable for the full amount of restitution.

The legislative history of § 3664(h) also notes that Congress intended to "give[ ] the court[s] the discretion either to make multiple defendants jointly and severally liable . . . or to apportion the restitution order among the various defendants." S. Rep. No. 104-179, at 15 (1996). This reference to joint and several liability in the Senate Report was not expressly incorporated into the MVRA, but the "joint and several" objective is implicit in the statute – § 3664(h) simply requires that the court make each defendant liable for the full amount of the restitution debt or apportion the debt among the defendants.

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[4] The concept of "joint and several liability" is a common law doctrine that,

> refers to the liability of multiple wrongdoers (typically, for torts). It means that damages are a single sum specified in the judgment, that each wrongdoer is liable for the full amount, but the wronged party cannot collect under the judgment *more* than the single sum. *Restatement (Third) of Torts* § 20 & cmt. b (Proposed Final Draft (Revised) 1999).

Tilcon Capaldi, Inc. v. Feldman, 249 F.3d 54, 62-63 (1st Cir. 2001).

Thus, making each defendant liable for the full amount of the victims' losses in the judgment for the same or related cases is the functional equivalent to invoking the common law "joint and several" language.

In sum, § 2259's incorporation of § 3664 by reference authorizes the imposition of joint and several liability.

2. Practical Problems and Solutions Concerning Joint and Several Liability

Form AO245B, the criminal judgment form, contemplates that a court will have complete information concerning all defendant debtors and victims at sentencing. However, restitution obligations are not always apparent at a single point in time. For example, defendants convicted in separate cases who participated in related offenses are responsible for the same foreseeable loss to the victim. A judge conducting the initial sentencing of one defendant may be unaware of the identity or existence of the other potential debtors who will be sentenced later. The judge therefore would not appreciate the need to enter a "joint and several" order that would account for all debtors who would be bound in future judgments. Likewise, the government may be unaware when the first offender is convicted that others are equally culpable and responsible for the same restitution debt. One way to address this problem is to include language in each restitution order that ensures that

separate orders considered together have the same legal effect as a consolidated joint and several order.

To enhance the likelihood that related restitution orders in different cases could support an interpretation that they may have the same effect as a single restitution order consolidating all debtors in a joint and several obligation, courts could include language in the restitution order stating that "the victim['s] recovery is limited to the amount of [her] loss and the defendant's liability for restitution ceases if and when the victim[ ] receive[s] full restitution." *See United States v. Nucci*, 364 F.3d 419, 422 n.3 (2d Cir. 2004) (proposing this express limitation precluding recovery by victim that exceeds loss when joint and several liability is imposed); *see also United States v. Scott*, 270 F.3d 30, 52-53 (1st Cir. 2001) ("If the defendants are each made liable for the full amount, but the victim may recover no more than the total loss, the implication is that each defendant's liability ends when the victim is made whole, regardless of the actual contributions of individual defendants."). Such language would allow the court to obligate each defendant to pay the full amount of the debt notwithstanding that the identity of all debtors might be unknown when the first restitution order is entered. It would also allow in different cases for relatively easy implementation of seemingly contradictory restitution orders that apportion different obligations to different defendants. For example, assume a court enters a restitution order in 2008 against defendant A for the entire victim loss of $200,000. In 2009, two

more defendants, B and C, are indicted and ordered to pay $80,000 and $40,000, respectively, towards the same loss. The statutory language requiring the first defendant to pay the full amount of the $200,000 restitution debt, combined with the language that the Second Circuit suggested in *Nucci*, would allow an interpretation of the orders that would make all the defendants jointly and severally liable for the $200,000. Defendant B would have to pay until he contributed his $80,000 or defendant A and/or defendant C (up to his $40,000 obligation) satisfied the $200,000. Defendant C would be obliged up to $40,000, but he would pay only a portion of that amount (or nothing) if defendant A and/or defendant B (up to his $80,000 obligation) paid off the entire debt before defendant C contributed. *See Scott*, 270 F.3d at 52-53; *see also United States v. Trigg*, 119 F.3d 500-01 & n.6 (7th Cir. 1997) (interpreting a pre-MVRA version of the restitution statute; noting that the MVRA had made the authority to impose joint and several liability broader than the pre-MVRA statute).

In addition to allowing enforcement as one joint and several order, the suggested language avoids the sort of ambiguity that could lead to recovery by a victim that exceeds her loss or payment by a debtor after other debtors have satisfied the total restitution amount. Given that full recovery on restitution orders is rarely achieved, the chance that a victim will realize a windfall double recovery is small. Nonetheless, it is a theoretical risk when multiple defendants

in different cases are ordered to pay full restitution, as opposed to a single "joint and several" order accounting for the entire debt and all debtors. Careful drafting of restitution orders is required because the MVRA does not explicitly prevent double-recovery in the criminal context, nor does it terminate a defendant's restitution obligation upon payment of the victim's losses by other defendants responsible for the same loss. *Nucci*, 364 F.3d at 423. Rather, it simply prevents overpayment when a victim is later compensated in a "civil" proceeding. *See* 18 U.S.C. § 3664(j)(2).

Despite the absence of an explicit statutory bar against orders that could result in restitution windfalls, courts generally abide by common law constraints against double recovery when joint and several liability is imposed. The Second Circuit noted in *Nucci* that it based its holding,

> on the common law background against which Congress is presumed to legislate. At common law, joint and several liability does not permit double recovery. As we have held, "[t]he effect of joint liability in a tort context is to excuse one defendant from paying any portion of the judgment if the plaintiff collects the full amount from the other." Because reading the statute to provide recovery in excess of the amount of the loss would be in derogation of the common law, Congress would have to speak clearly and unequivocally to authorize it. Congress has

not done so here; accordingly, we apply the common law rule.

The situation presented in this case, where one defendant was ordered to pay the full loss from five burglaries after his co-defendants had been ordered to pay restitution for some but not all of the burglaries, is but a variation on the same general theme of no double recovery upon orders of joint and several liability. While the district judge could have made it clearer in her restitution order that a given victim would not be allowed to receive compensation in excess of his loss, and probably should have in order to remove the question from all doubt, we will not find error for any failure to do so because, in any event, absent a statutory command, there is no legal basis to permit an award that allows a victim to recover more than his due. We read the First Circuit's decision in *United States v. Scott* as following essentially the same reasoning.

The district court's decision to hold Nucci accountable for the entire $34,476 is in accordance with the MVRA' rules regarding apportionment of liability. Accordingly, we . . . hold that a district court does not commit error by failing to state explicitly that a victim's recovery shall be limited to the amount of its loss.

Nucci, 364 F.3d at 423-24 (citations omitted).

Applying the approach that the Second Circuit discussed in *Nucci* would simplify the implementation of separate, but related, restitution orders. This procedure, however, does not diminish the administrative burden on the Clerk's Office to insure that all debt payments are accurately accounted for to prevent overpayment. The most practical way for clerks to simplify their responsibilities would be to confer with the U.S. Attorney's Office, which has the investigative resources to identify all those responsible for the loss and all victims, and the U.S. Probation Office, which is responsible for a complete accounting of the losses to each victim, identification of plea agreement provisions concerning restitution, and provision of notice to all identified victims. 18 U.S.C. § 3664(a), (d)(1) & (2). Both the Probation Office and the U.S. Attorney's Office are responsible for maximizing debt collection, so each has a stake in cooperating in your administration of the debts.

To my knowledge, however, it would be highly impractical if not impossible for a clerk to track debt payments in multiple jurisdictions over an extended period of time to insure that a § 2259 victim does not receive windfall restitution payments. Clerks would be unaware of subsequent convictions that result in new joint and several orders. One way of addressing this uncertainty would be for the court to shift the burden of insuring against double recovery to one of the parties. Section 3664(e) imposes the burden of demonstrating the amount of loss on the government, but it also provides that "[t]he burden of

demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires." 18 U.S.C. § 3664(e). If the government proposes joint and several restitution in cases of this sort, it seems that justice may require that the government demonstrate how it will ensure that windfall recoveries will not ensue.[5]

Of course, this discussion is in all likelihood academic. To my knowledge, the government has never promoted § 2259 restitution orders in pornography possession cases of this type. Courts may be unlikely to enter such orders because it may be impossible to establish a causal relationship between the crime of possession and the victim's loss.

3. Coordinated Restitution Fact Finding in One Venue

Because the victim's counsel has made restitution requests on behalf of the same victim in multiple jurisdictions, fact-finding in each case will involve common issues and the potential of inconsistent resolutions. To avoid an apparent inefficient

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[5] The Crime Victims' Rights statute, 18 U.S.C. § 3771, requires the government to use its best efforts to see that victims are accorded their rights, including the "right to full and timely restitution as provided in law." The government's reluctance to advance Mr. Marsh's and the victim's advocates' position suggests that it believes that alleged victims depicted in pornography possession cases have no legal right to restitution under present law.

duplication of effort, you ask whether courts in different districts could transfer the restitution component of the criminal sentences to a single venue that would resolve factual and legal issues common to all cases. The example you have in mind is the Judicial Panel on Multidistrict Litigation's ("JPML") authority to transfer pretrial proceedings in civil actions. Such transfers in civil cases under 28 U.S.C. § 1407 place all similar actions before a single judge who develops a pretrial plan that allows discovery regarding any noncommon issues to proceed concurrently with discovery on common issues.[6] This procedure enhances the likelihood that pretrial proceedings will lead to just and expeditious resolution of all actions that will generally benefit all parties. *See In re Vioxx Products Liability Litigation*, 360 F. Supp. 2d 1352 (J.P.M.L. 2005).

Notwithstanding its efficiency, such consolidated factual and legal determinations are precluded by the Constitution and Rule 18 of the Federal Rules of Criminal Procedure. Rule 18's restrictive venue requirement would preclude transfer and consolidation of related restitution proceedings to a single district. Rule 18 states:

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[6] 28 U.S.C. § 1407 authorizes the JPML to transfer and consolidate pretrial proceedings and the plaintiff's choice of forum when (1) one or more common questions of fact are pending in different districts, (2) a transfer would serve the convenience of parties and witnesses, and (3) a transfer would promote the just and efficient conduct of the actions.

> Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed. The court must set the place of trial within the district with due regard for the convenience of the defendant, any victim, and the witnesses, and the prompt administration of justice.

Fed. R. Crim. P. 18. While no court has definitively held that Rule 18 governs the venue for sentencings or the restitution component of a criminal sentence, no other rule or statute could conceivably apply, and the U.S. Supreme Court observed, in *Bradley v. United States*, 410 U.S. 605, 609-11 (1973), that "sentencing is part of the prosecution." *See also United States v. Avants*, 367 F.3d 433, 451-52 (5th Cir. 2004) (recognizing that Rule 18 likely applies in this context; holding that the Rule 52(a) harmless error rule, however, precluded reversal of a district judge's decision to conduct sentencing in the Northern District of Texas rather than the Southern District of Mississippi, which was the appropriate venue). Rule 18 authorizes a change of venue if a statute or the Federal Rules of Criminal Procedure permit, but no rule or statute authorizes such a change under these circumstances. The only authorization for a sentencing hearing venue change is contained in Rule 20 ("Transfer for Plea and Sentence"), which authorizes a plea and sentencing to occur in a district other than the one in which the defendant was indicted. This rule applies, however, only when *both* the plea and sentencing occur in a district other than the one

where the indictment or information is pending. *See Cook v. United States*, 171 F.2d 567, 569 (1st Cir. 1948) (resentencing of a defendant who was tried, found guilty, and sentenced in the District of Massachusetts must be done by a court in that district; a defendant imprisoned in California could not consent to transfer of his case to the Northern District of California for resentencing).

Rule 18's bar against venue changes to a district other than the one where the offense occurred reiterates a constitutional venue right in criminal cases that appears in two places in the Constitution. Article III, section 2, clause 3 states that, "[t]he Trial of all Crimes . . . shall be by Jury; *and such Trial shall be held in the State where the said Crimes shall have been committed.*" U.S. Const. art. III, § 2, cl. 3 (emphasis added). The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State *and district wherein the crime shall have been committed*, which district shall have been previously ascertained by law." U.S. Const. amend. VI (emphasis added). The Constitution does not provide a similar constitutional right to venue in civil cases, thus the JPML may transfer venue and consolidate pretrial proceedings against a plaintiff's wishes. Criminal defendants may waive the constitutional right to venue, but few defendants would deem that course of action to be in their interest. In sum, changing venue for a component of criminal sentencing is unauthorized based on the constitutional guarantee

to trial in the district where the offense was committed.

While consolidation of related matters in one venue is not possible, the 1996 MVRA amendment to 18 U.S.C. § 3664 authorized district judges to refer criminal restitution matters to a magistrate judge or special master. Section 3664(d)(6) states:

> The court may refer any issue arising in connection with a proposed order of restitution to a magistrate judge or special master for proposed findings of fact and recommendations as to disposition, subject to a de novo determination of the issue by the court.

18 U.S.C. § 3664(d)(6). Unfortunately, Congress neglected to provide statutory or regulatory authority for payment of special masters appointed under § 3664(d)(6). In this regard, § 3664(d)(6) referrals differ from referrals to special masters in civil cases under Federal Rule of Civil Procedure 53 or for remedial proceedings in prison conditions cases, *see* 18 U.S.C. § 3626(f)(4) (setting hourly rate not to exceed that for appointed counsel to be "paid with funds appropriated to the Judiciary"). Rule 53 and § 3626(f)(4) provide explicit payment instructions and identify the source of funding for special masters; § 3664(d)(6) is silent on payment matters. The absence of payment authority for § 3664(d)(6) special master referrals explains why most restitution referrals are made to magistrate judges rather than to special masters. Nonetheless, the authority to refer restitution matters to a magistrate judge or a special

master compensated by one or more parties may alleviate some of the workload imposed on district judges by complex § 2259 fact finding.

4. Victim Status and Causation Requirement

Whether children who are victims in a general sense by virtue of their depiction in pornography are also entitled to restitution under § 2259 when the offense of conviction is possession of pornography (as opposed to its production and distribution) is an issue about which the government, the victims's advocates, and Mr. Marsh disagree. Section 2259 requires that a court order a defendant convicted of any sex offense in chapter 110 of Title 18 of the U.S. Code to pay restitution to the victim. "Victim" is defined as "the individual harmed as a result of a commission of a crime under . . . chapter [110]." The government and the victim's advocates disagree about whether the possession offense must be the cause of the loss, and if so, whether "proximate cause" is the appropriate causation standard. The government and the victim's advocates seem to agree that causation of some type is required, but they part ways when attempting to resolve the difficult question of whether the causal connection between crime and harm must be "proximate cause" or merely a more generalized and perhaps broader causal link, such as "but for" cause.

The government and courts applying the statute have interpreted § 2259 to require proof that the crime proximately caused the harm before restitution

may be awarded. The victim's advocates accurately counter that there is no proximate cause requirement to be found in § 2259 except for the § 2259(3)(F) catch-all concerning "other losses suffered by the victim as a proximate result of the offense." Given the apparent absence of an unambiguous proximate cause requirement for the specific categories of losses, the victim's advocates suggest that Congress intended that courts assume that possession offenses satisfy the § 2259 "cause" requirement because possession offenses fall within chapter 110 and the victims are indisputably injured.

The phrase "proximate cause" first entered the restitution idiom in 1996 when the MVRA added a definition of "victims" into 18 U.S.C. §3663 and created 18 U.S.C. § 3663A, a new mandatory restitution statute. The predecessor restitution statute, 18 U.S.C. § 3579(a)(1) (1982), simply authorized a court to order "a defendant convicted of an offense" to "make restitution to any victim of such offense." The absence of a statutory causation standard caused a circuit split over whether a court could order restitution for losses beyond those related to the offense of conviction. In *Hughey v. United States*, 495 U.S. 411 (1990), the Supreme Court resolved this split by carefully analyzing the statute as a whole:

> As the Government concedes, . . . a straightforward reading of the provisions indicates that the referent of "such offense" and "an offense" is the offense of conviction. Given that the ordinary meaning of "restitution" is

> restoring someone to a position he occupied before a particular event, *see*, *e.g.*, Webster's Third New International Dictionary 1936 (1986); Black's Law Dictionary 1180 (5th ed.1979), the repeated focus in § 3579 on the offense of which the defendant was convicted suggests strongly that restitution as authorized by the statute is intended to compensate victims only for losses caused by the conduct underlying the offense of conviction.

Id. at 416. The Court thereby confined losses compensable by restitution under the VWPA to those caused by the offense of conviction.[7]

Reading § 2259 with the same rigor that the Supreme Court applied in *Hughey* yields the conclusion that offenders who commit a chapter 110 offense are subject to the mandatory restitution provision only if the losses are "a proximate result of the

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[7] The pre-*Hughey* and pre-MVRA "scheme" provision in 18 U.S.C. § 3663(a)(2) was unchanged by the MVRA and continued to provide for broader restitution exposure with respect to offenders convicted of any type of scheme offense: "in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, [the court may order the defendant to pay restitution to] any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern." Attempts by the victim's counsel to rely upon § 3663(a)(2) "scheme" cases as support for expansive awards under § 2259 should be rejected. Uncharged crimes committed in furtherance of a scheme offense of conviction are a component of the scheme causing compensable harm. The offense of possessing pornography in 2008 is not a component of someone else's unrelated scheme to distribute it in 1998.

offense" of conviction. 18 U.S.C. § 2259(b)(3)(F). Section 2259(b)(1) requires that the "order of restitution under this section [ ] direct the defendant to pay the victim . . . the full amount of the victim's losses." Section 2259(b)(3)(F) defines the phrase "full amount of the victim's losses" as including several specific categories of loss such as attorney's fees and psychological care. The list of specific items concludes by requiring compensation for "any other losses *suffered by the victim as a proximate result of the offense.*" *Id.* § 2259(b)(3)(F) (emphasis added). The subsection (b)(3)(F) catch-all category of loss is expressed as conjunctive with the preceding specific items of loss, and it contains the only reference to a standard of causation in § 2259 – "proximate cause of the offense."

The victim's advocates contend that the subsection (b)(3)(F) proximate cause requirement was designed to apply only to "any other losses." They allege that Congress intended that the wide variety of specific losses mentioned in subsections (b)(3)(A) through (E) should be viewed as lacking a proximate cause requirement. Under this anomalous interpretation, restitution would be required whenever an offender committed a chapter 110 possession offense, notwithstanding that the victim's injury might have been caused exclusively by the offender who originally exploited the victim and distributed her image. The conjunctive structure of § 2259(b)(3) and the interpretive requirement of reading the statute in its entirety that the Court imposed in *Hughey*, however, reveals that the § 2259(b)(3)(F) phrase "suffered by the victim

as a proximate result of the offense" should apply to all the specific items of recovery in § 2259(b)(3)(A) through (E) as well as the catch-all "any other losses" mentioned in § 2259(b)(3)(F). As the government noted at page 4 of its brief, courts generally recognize that § 2259 requires a causal connection between the offense of conviction and the victim's harm, and that causal standard is almost always characterized as "proximate cause." *See United Slates v. Doe*, 488 F.3d 1154, 1160 (9th Cir. 2007) (invoking proximate cause standard recognized in *United States v. Laney*, 189 F.3d 954 (9th Cir. 1999), but holding that §2259 losses do not have to be established with "mathematical precision"); *Laney*, 189 F.3d at 965 ("Section 2259 . . . incorporates a requirement of proximate causation."); *United States v. Crandon*, 173 F.3d 122, 126 (3d Cir. 1999) (affirming award of restitution under a proximate cause standard); *United States v. Searle*, No. 02-1271, 2003 WL 21025, *2 (2d Cir. May 2, 2003) ("Because the children's father ceased to care for them shortly after discovering the pornographic videotape involving his son . . . , the district court reasonably concluded that the defendant's actions proximately caused the children's loss of their home and father."); *United States v. Raplinger*, No. 05-CR-49, 2007 WL 3285802 (N.D. Iowa Oct. 9, 2007) ("The statute is broadly worded: any loss suffered by a crime victim as a proximate result of the offenses of conviction qualifies.").

The victim's advocates respond to this uniform adverse case law construing a relatively lucid

statutory proximate cause requirement with an emotional appeal: "Clearly Congress wanted sentencing courts to side with the victims of child pornography – not their victimizers." Brief of National Crime Victim Law Institute, The National Center for Victims of Crime, and the Victim Rights Law Center, at 22. A fair reading of § 2259, however, establishes that it, like other restitution statutes, contains a proximate cause requirement. Section 2259 is more favorable to victims of chapter 110 offenses than other restitution statutes in that it authorizes compensation for a broader array of losses in § 2259(b)(3) than is usually allowed. Nonetheless, the statute's causation requirement likely precludes its application to possession offenses. This conclusion is borne out by the government's refusal to endorse Mr. Marsh's restitution requests in cases involving mere possession. Restitution under § 2259 would be possible in possession cases that also include conviction on a distribution count, because the *redistribution* of pornography could cause additional harm. There is no indication in the statute or its legislative history, however, that Congress intended that sentencing judges do more than dispense justice impartially by ordering restitution to the extent authorized by statute. Repugnant as child pornography possession offenses are, the only appropriate judicial role is to apply § 2259 evenhandedly.

I hope this discussion responds to your concerns. Please contact me if you have any further questions.

Sincerely,

/s/ Joe Gergits
Joe Gergits
Assistant General Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

UNITED STATES OF AMERICA	)	DOCKET NO. 6:08cr61
-vs-	)	Tyler, Texas 10:00 a.m. August 20, 2009
DOYLE RANDALL PAROLINE	)	

TRANSCRIPT OF RESTITUTION HEARING
BEFORE THE HONORABLE LEONARD DAVIS,
UNITED STATES DISTRICT JUDGE

APPEARANCES

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Proceedings taken by Machine Stenotype; transcript was produced by a Computer.

* * *

[12] MR. FILES: It is not only the information, but it is the not being able to furnish the effective assistance of counsel by being limited as to whom I could associate with and have help me in this preparation and trial of the case.

THE COURT: Well, have you visited with him about that?

MR. FILES: No, Your Honor, we have not.

THE COURT: Visit with him about that, tell him who you want to share it with, and see if you can work out an agreement.

MR. FILES: All right.

THE COURT: Okay. Mr. Baldwin, you may proceed with your opening statement.

MR. BALDWIN: First of all, I would like to summarize the undisputed facts, and I am sure Counsel will object if I misstate the facts. The facts are set forth in the Pre-sentence Report dated February 18th, 2009. That includes the offense conduct. Also, there was a Plea Agreement which attaches a factual resume. Both of those documents are on file under seal and represent evidence in this particular situation.

It is undisputed, I believe, that of the approximately 300 photographs that the defendant possessed, child porn photographs, two were of the victim Amy. There is [13] no indication that the defendant was file-sharing. He was merely receiving these photos from downloads on the Internet and possessing them.

During his plea and through the Plea Agreement, the defendant received the notice of the penalty of restitution as part of the sentencing penalty in this case. That is in the Plea Agreement at Paragraph 3(e); and it indicated that the defendant would be responsible for restitution to victims, which may be mandatory and which may include restitution arising from all relevant conduct, not limited to that arising from the conduct of conviction alone.

Also on file and a part of the record and we would submit and have submitted and relied upon as evidence, is the victim's request for restitution in the amount of approximately $3.4 million. It includes the victim's attorney's brief and the request itself; the

victim's impact statement, which I read at sentencing and is part of the record; it also includes a report of a psychologist who consulted the victim on several occasions in 2008, conducted interviews – that psychologist was Joyanna Silberg, PhD. Her resume is on file as well – who indicates the value of the future treatment necessary as $512,681.

There is also a submission regarding a financial and economic loss and an assessment and evaluation of that by Stan Smith, PhD, of Smith Economics Group, indicating that future [14] wages lost are in the amount of $2,855,173. Mr. Marsh also requests expert witness fees of $15,550, as well as attorney's fees. And at Page 14 of the request for restitution, Mr. Marsh indicates that the total amount of restitution is $3,408,404. And I believe he is also asking for attorney's fees as well.

He is here today and is prepared to, it is my understanding, explain any – or answer any questions that the Court would have regarding those submissions, but we would rely on those as evidence, as well as the evidence in the Pre-sentence Report and in the Plea Agreement as well.

Now, obviously, the restitution is governed by 18 USC, Section 2259, which is a mandatory restitution requirement to the victim by the defendant. And the language there says, "The restitution shall be the full amount of the victim's losses as determined by the Court." 2259 directs that any restitution order entered by this Court be issued and enforced in the

manner set forth in Title 18, United States Code, Section 3664.

And the rules set forth in 3664 are the only rules that apply to this hearing. Hearsay is admissible, and I would submit that the Government has the burden of proving by a preponderance of the evidence that Amy has been damaged.

* * *

[16] MR. BALDWIN: Then in Ashcroft in 2002, which we have submitted, that is the Supreme Court case – the Supreme Court concluded in citing Ferber that these types of photos of Amy are a permanent record of her abuse; and that when each new publication occurs, the injury follows it. So there is a new injury with each publication of these photographs.

Now I go back to the 1998 case of Norris, which is a Fifth Circuit case. It was addressing the issue of grouping within a Guidelines analysis, but the rationale is very powerful. The case makes it clear that Amy is a victim, and there is some specific language in Norris that is very powerful and I believe applies directly to this hearing. That case says that, "The consumer who merely or passively receives or possesses child pornography directly contributes to the continuing victimization." They go on to say that, "The consumer of child pornography instigates the original production and that consumers of child pornography, therefore, victimize the children depicted, supporting the continued production, which entails direct abuse and victimization of the subject."

So, in effect, Amy is a victim of Paroline's conduct. It is a part of her continuing victimization that Paroline participated in. Norris says that the victimization flows just as directly from the crime of receiving, which he [17] received these photographs from the Internet, as it does from producing or distributing. It is a very powerful rationale that they use as it relates to this type of criminal activity, which is unique in that sense.

I know that Mr. Bales, the U.S. Attorney, is here; and we were discussing this case. And we believe that in a sense when Mr. Paroline downloaded these photographs, he stepped into the room of the abuse of Amy. It is the nature of our digital age and the Internet in a virtual world is that Mr. Paroline goes right into the room of the abuse and is a participant. And I believe Norris backs up that analysis.

So if we were to apply proximate cause, we would have to say through this analysis and through Norris, that Mr. Paroline was there when it occurred. Following that analysis, one has to conclude that Amy is a victim. Then we look to see what the damages are. She has proven the damages, and under the Norris analysis it appears that Mr. Paroline stepped in the shoes of the producer from the very beginning.

Looking at 2259 it appears that Congress is saying to Mr. Paroline you are now responsible for the entire amount of the damages that can be proven.

Now, what is the evidence that is before this Court? I submit when you take the submission by Mr.

Marsh and you put with it the victim impact statement, which is incredibly powerful, it explains what she has gone through, [18] the impact on her life, the fact that she wanted to go to college, she wanted to be a teacher, but she could not do that. She tried. And you consider what her lost income is – would have been in the future and the damages that she has been exposed to are the victimization that she has endured.

It is clear that there is a sufficient indicia of reliability with that impact statement and the other submissions for this Court to consider. Once this Court considers that, I believe it proves by a preponderance of the evidence that she has been damaged in that amount because there is no other indication that she has been damaged any less. And I think common sense explains to us that clearly she has been damaged severely. Once that occurs, I think this Court has to enter an order for the full amount of the restitution.

I am not – it is a difficult area to grasp. I think a lot of other courts are struggling with the issue of specific conduct and causation related to what the value of that causation is to damages, but you cannot get there if you try to calculate the possession of two photographs as it may relate to damages that occurred at the time of that possession. But if you look at Norris, Norris says, wait a minute, if you step into that room, you go back in time to the original damage and you accept the entire amount. That is what I believe is governing this particular hearing.

* * *

THE COURT: Thank you. I interrupted you. Go ahead.

MR. MARSH: So the victim's parents in this case were receiving notices. And at that point in time they didn't know what they were or what significance they had; and they were seeking the assistance of an attorney to help them, primarily at that point take charge of these notices and become the point of contact because they were literally overwhelmed with hundreds and hundreds of notices. At that point in time they did not want to take any specific action with regard to the notices. That was in 2006.

In 2007 Amy turned 18 and at that point in time contacted my office directly to discuss, again, the notices and what the notices meant and, again, provide some legal advice regarding those notices. One of our first and primary goals from our work with federal law enforcement was to provide a victim impact statement for use at sentencing. I was not familiar at that point in time with restitution, and I wasn't even thinking about restitution. This was in 2007 and 2008.

And at that point in time we wanted to find a forensic psychologist to assist us, not only in evaluating our [33] client, but also for the creation of a victim impact statement. And I interviewed a variety of professionals and settled on Dr. Silberg. And one of my charges for her was to create a victim impact statement. I didn't provide any context – well, other than that it would be used at criminal sentencing.

I didn't provide any guidelines. I didn't provide any samples. I merely said, is this something that you can sit down with a victim to help create?

I did not want it to be written by an attorney. I did not want it to be viewed as a litigation document or a legal advocacy document or an affidavit even that the attorney created. I wanted to rely solely on the expert in this case and the victim to create that statement for aid in sentencing. So that was one of the first charges of Dr. Silberg.

The second charge was then to produce a report outlining the damages for my victim/client and to provide some context for those damages. Again, I didn't engage in any drafts or revisions or clarifications with her. Knowing full well that these materials would be viewed as litigation documents, I wanted to allow her to proceed as a professional with regards to both of those documents without, if you will, the coaching of a lawyer.

So the documents that she produced, both her report and the victim impact statement are the documents that the [34] Court has today. With one exception, in the victim impact statement I reviewed it with my client and changed one part of the document which she said wasn't true, so we just omitted a sentence. But, otherwise – I put out a piece of paper but, otherwise, I didn't aid in the creation of that document.

THE COURT: By the victim impact statement, that is what has been filed with the Court and

was read at the sentencing, the victim impact statement of Amy the victim in the Misty Series –

MR. MARSH: That's correct, Your Honor.

THE COURT: – which is about three pages in length. It does not mention any restitution amounts. It just speaks of the impact that her abuse and the sharing of pornographic photographs of her as a minor has had on her.

MR. MARSH: That is correct, Your Honor. I put it on that piece of paper, but I did not – other than deleting one sentence – contribute to the context. I, of course, submitted it in this case and in several other cases.

THE COURT: Okay.

MR. MARSH: That was in 2008, Your Honor, that that was completed and delivered to the U.S. Attorneys in the Office of the Child Exploitation and Obscenity Section of the U.S. Attorney's office in Austin. And they have a system of distributing those in cases throughout the country. They have a couple of different ways of distributing them. But what we [35] eventually settled upon is that we would distribute them as part of our submissions, although I think it is important for the Court to note that in cases in which we, for whatever reason, do not or cannot or are unaware of cases that the U.S. Attorneys are responsible for accessing those victim impact statements and submitting them even if we didn't want them submitted because they are victim impact statements.

THE COURT: If I understand you correctly, the victim impact statement was written by Amy without you help other than taking out one sentence?

MR. MARSH: Yes, Your Honor. She wrote it in conjunction with Dr. Silberg. Dr. Silberg is more capable of addressing the format of how it was created. But what I can tell you is that it was created – Dr. Silberg drafted it based on notes that she took during the, I believe it was four interviews with Amy. It was reduced to writing and reviewed by the client; and with the exception of that one sentence, was approved by her as her statement. So that was how it was created.

THE COURT: So Dr. Silberg actually wrote the statement based upon what Amy had told her?

MR. MARSH: Correct. And those are the notes that – I wouldn't even call it a dispute – that we have some concerns about in terms of their wide distribution with the defendant.

* * *

[45] In April and May we began sending out restitution requests in cases that were nearing sentencing, and the Court I know has some numbers – and this has become a big issue in subsequent cases, but what I can tell you is we have now to date submitted 250 requests for restitution. And I dare say it involves probably every district in the country at this point.

What we are discovering – just to digress briefly because I believe that this is important and this is one, perhaps, heart of the analysis that the Court wants to take into account – we are discovering that in the vast majority of these cases that the defendants are indigent and that they have no assets at all. Some of them have negative net worth. Some of them have very little net worth. But the vast majority of these individuals are indigent, meaning that they have publicly-appointed counsel and the PSI indicates that they have no ability to pay a fine.

THE COURT: Which is not uncommon in any criminal – I'd say in the majority of criminal cases that we see; and in those cases normally if restitution is involved, be it from bank fraud or whatever, the amount is entered and then the restitution is, as I recall, usually set at 10 percent of the defendant's gross earnings while under supervised release. And we can get into that later, perhaps; but then after supervised release is over – and I think –

[46] Actually isn't a portion taken out while they are in prison for restitution or not, Mr. Wells or Mr. Thomas?

MR. THOMAS: Yes, sir, there is a small amount taken out in prison.

THE COURT: What they earn in prison is taken out that is applied toward that; and when they come out on supervised release, an indigent defendant would be required to pay 10 percent of

their earnings, gross earnings toward that restitution order.

While they are under supervised release, right?

MR. WELLS: Well, that is at a minimum, Your Honor.

THE COURT: Excuse me?

MR. WELLS: That is at a minimum.

THE COURT: At a minimum. Then after supervised release then the restitution section would continue to pursue, as long as viable, an agreement for them to pay a portion of their earnings toward the restitution amount.

Is that right?

MR. WELLS: That is correct, Your Honor.

THE COURT: All right. Thank you.

Go ahead, Mr. Marsh.

MR. MARSH: Yes, thank you for that clarification. Because, you know, it is an issue; and as Professor Cassell points out, you know, as the Court recognizes we aren't seeking anything beyond the amounts in our request. And we [47] fully believe and fully hope at some level that once we max out with that amount, that we will be in effect done with restitution in terms of –

THE COURT: That amount is all across the board now, isn't it? Isn't it somewhat of a – I know

what you have asked for, and some courts have granted almost that much and some have granted nothing and some have granted lesser amounts.

MR. MARSH: Well, we view the amounts that we have proposed as global amounts from all sources. So, again, another issue for this Court to struggle with – and I will say that many courts throughout the country are waiting for this Court's decision. I have a lot of cases being delayed until like October or November because I think they are waiting on this Court to make a determination.

But, you know, we view our request for restitution as a global request. And without being disingenuous or disrespectful, we don't care how that pot gets filled. Once we get the 3.3 or 3.5 from all these defendants, whether it is $10,000 or $50,000 – I will get to the very interesting fact in a second of the amounts – we are going to be done with restitution. We have got our request. You know, we don't view – one defense attorney said, Mr. Marsh, you have got 250 requests, three million dollars, that's a billion dollars you want. We are not looking for a billion dollars. We are [48] looking for the 3.3. And if we get really courageous we are going to go into Hedonic Damages, but we are not looking to go beyond that maximum from all sources.

Then, as the Court I think recognizes, it does in some ways become an apportionment issue, an apportionment not only by and between the defendants but also by and between future defendants. But let me

provide some more facts to the Court so we can grapple with this in some more concrete terms.

So that was where we were in June of this year. And in June of this year we were beginning to get some feedback from AUSAs, this is Assistant United States Attorneys throughout the country, about possible cases that might be worth pursuing. And, to be honest with the Court in all honesty, we have not wanted to waste the time or resources of the Federal Government and the U.S. court system, which I know is one of the issues for this Court.

So as a practical matter and as a policy in our office where individual defendants are shown to be indigent, we have been withdrawing requests and not pursuing restitution in those cases, at least initially because there is already enough issues to deal with just on the baseline issues. So in approximately, you know, 80 percent of the cases, we are withdrawing.

* * *

[60] MR. MARSH: Let's put it that way. I want it –

* * *

MR. MARSH: Your Honor, the only issue – and, again, I think the proximate cause issue Your Honor is fully aware of and engaged with. It is a matter of statutory interpretation. We have stated our position. I have adopted the position of Professor Cassell in his brief on the issue. The courts are struggling with the proximate cause issue. I don't –

and Mr. Baldwin states in one of his footnotes, 13, that it is nonsensical. I respectfully disagree with it. Certainly Congress could find that the set of enumerated losses are a baseline and anything else you wanted to get, you have to prove some more.

You know, as remedial legislation if my client came and said, you know, I found out I was a victim of child of pornography, you know, and a week later I broke my leg, I want you to pay for my broken leg, maybe we would have to provide something more. Is the broken leg related to the injury of [61] child pornography – caused by child pornography? Is there any proximate cause between the broken leg and the possession? But, clearly, I don't think that it is necessarily nonsensical for Congress to provide a baseline of recognizable and enumerated losses with the provision that if you want more, if you want something different or unique – and perhaps our claim for Hedonic Damages – without conceding the issue – would be that, then clearly you need to provide the Court with something more to base it on.

THE COURT: So you are saying if you are a victim of child pornography, then the enumerated (a) through (e) in 2259, medical services relating to physical, psychiatric, or psychological care; physical and occupational therapy or rehabilitation; necessary transportation; temporary housing; childcare expenses; loss income; and attorney's fees as well as other costs incurred, that those are not subject to a proximate cause test relating to this defendant but all defendants that have, as Mr. Baldwin said, entered

the room are jointly and severally responsible for those; but if there is some other loss such as breaking the leg or something else, then under subparagraph (f) any other losses suffered by the victim as a proximate result of the offense, that is where the proximate cause would come in?

MR. MARSH: Yes, Your Honor. That is our position. And I think for all of the reasons that have been stated ad [62] nauseam in all of the papers that, you know, if you look at what the Supreme Court said, if you look at what the courts of appeals have said – and I am not talking specific – well, I am going to get to that in one second. If you look at the other statutory scheme, the MVRA, and the general restitution statute, they are all very specific in linking victimhood, if you will, victim's status to proximate cause. And this statute doesn't.

And what you see in the cases from the Supreme Court on down and in the Congressional language and in the statutory language is the use of the word "harm"; that the victim has to be harmed by a violation of Chapter 110. And, you know, Congress – and in their findings, if you will, Congress recognized there is a set of enumerated harms, that that based on all of the material that has been discussed so aptly by Mr. Baldwin and myself and everyone else in the papers, recognizes that there is a harm. There is a harm from this criminal activity.

I think what has been equally recognized and because the law characterizes this fundamentally or

at least primarily as a privacy tort, it is an invasion of the privacy of the victim and a revictimization. I liked what Mr. Baldwin said about, you know, the stranger in the room, because I think more accurately than anyone has been able to elucidate, he describes precisely the harm that Congress is trying to . . . [66] in which judges, police officers, politicians, lawyers, doctors, accountants, and the boy next door, all know her; but she doesn't know them. She can't know them. And that is the real nature of the harm in this case. And Dr. Silberg can talk more about that, and Dr. Cooper can speak more about that.

But if you look at the totality of the crime from start to finish and how my client has gotten to this point, she exists in a world – we just had one, the Staples case involved a law enforcement officer. He, in fact, was a court officer in the federal courthouse. He was trading in child pornography. So for my clients, in effect – and, again, I am not trying to testify, but I am just offering our perspective, there is no safe place for this girl in the world.

She doesn't know who has seen it, who is trading it, who is talking about it, who is laughing at her, who is comparing her to the pictures. It could be anyone. As the Court knows, I'm sure the Court has seen these defendants – I know because I have 800 of them – they are all kinds of people from everywhere; people that you could not imagine would engage in this activity.

THE COURT: You say you have 800 defendants that have been identified in the Amy Series?

MR. MARSH: Yes, I will explain where that number comes from, too, because that is a good point. We have 250 [67] requests that are pending. Those individuals are pre-sentencing or pending sentencing. And we are at the point now where when new defendants are identified, we generate requests so that as soon as we get notice that our client is a victim, we generate a request for restitution. That can take place anywhere in the case.

Unfortunately, a lot of times it only occurs right before sentencing because of the process that the Court recognized earlier involving the identification process. And it takes a while to go to the National Center and to come back and to issue the reports. And sometimes that takes place only prior to sentencing.

For the other – I don't know, what are we talking, 550 cases, probably half of those individuals have been sentenced. Again, my client started receiving notices in 2005, so these are from 2006 and 2007 and 2008 from individuals who have been sentenced. That makes up the bulk of those numbers. Those individuals are not, if you will, subject to restitution at this point.

Then we have a handful of individuals; military and other, Forest Service and state courts and then we have individuals that we just – we got one notice from them back in 2005 and never heard anything again. I have a law student coming in, and we are

going to go through every single case on ECF and pull down all of the relevant documents to find out . . . [71] those things work – and basically looking towards Congress's intention in those cases to say, you cause any harm – because the standard in that case is actual harm caused by the violation – then it is $150,000.

And, quite frankly, from the victim's standpoint, this victim in this case's standpoint, we have more than enough defendants from now until eternity to fill our three million dollar pot with $150,000 awards. It is not going to be that way in every case. But in this case we have, perhaps, the fortunate or unfortunate scenario where I get one or two of these sometimes a day of new defendants. So we have plenty of time to fill that bucket of damages.

But then there is the point that Mr. Baldwin makes, which I think is worthy of dealing with because it may, in fact, have a constitutional dimension, which he so aptly points out, which is the amortization of damages and not making this defendant in effect liable for damages that pre-dated his offense because, again, we have presented a global, if you will, package of damages. And Dr. Smith has been very good – if you see all of the charts and tables and other materials that he submitted – of breaking down, of really amortizi – amortize – how do you say that word? Amortizing those losses – whatever – putting them down here and here and showing how they add up.

Dr. Smith is in China right now, but I called him [72] when I got Mr. Baldwin's brief and I said, you

know, what is this? This is crazy. How are we ever going to figure this out and break all this stuff down? I don't know that he read it or understood it either, but clearly he would be helpful to the Court in addressing that specific issue in terms of the ability to sort of amortize these costs over a lifetime, which is what in effect he has done.

In appreciating the constitutional dimension, you know, that may be something that the Court needs to consider in terms of – and even part and parcel of the due process –

THE COURT: I'm not sure I fully understand the amortization. Perhaps Mr. Baldwin or you can explain that.

MR. MARSH: I think what Mr. Baldwin – he is certainly capable of speaking to the issues. What he is saying is we have a global number – and let's just use three million dollars for simplicity – for January 1st, 2009, which I believe is the date that Dr. Smith bases his numbers on, up through her lifetime, therapy included, and a reduction in wages because I think it is important for the Court to realize that we are not claiming full lost income; that there is an offset.

THE COURT: Let me be sure I understand. In your expert's analysis, are they seeking damages prior to January 1, 2009, past damages?

MR. MARSH: No, not at this point because she was a [73] minor, and we didn't view her as being in the work force prior to.

THE COURT: You are talking about economic damages? What about counseling –

MR. MARSH: I am talking about both economic and counseling. We were projecting those for –

THE COURT: Just prospectively?

MR. MARSH: Prospective, yes, Your Honor.

THE COURT: Okay.

MR. MARSH: All of the nature of our request is prospective.

THE COURT: All right. What about the amortization?

MR. MARSH: Yes, and so what Dr. Smith's – I sort of said I need some sort of – I don't know, this thing popped in my head, I need a forensic economist and I Googled him and he came up and I said I needed someone to break down all these damages because I want to present the Court with – it is not me talking or adding, I want somebody to add these things up and put some basis to them so we can present them to the Court in an expert way, so that is what Dr. Smith did.

His methodology, which he describes in his report but I will just review briefly with the Court, is that in terms of future therapy expenses he consulted with

Dr. Silberg, he reviewed the numbers that she provided for the cost of therapy, and then he factored in, you know, whatever [74] economists do; cost-of-living, increases in the costs of therapy. And he plugged all this data into a spreadsheet and then showed how these costs accumulate yearly over her lifetime. So there is a breakdown already for those costs.

In terms of lost income, he did the same thing. But – and this is an important "but" – he did not claim complete incapacity in her ability to work. There is an offset. And I believe he credited her – or in effect the defendant – with the ability to work 15 hours a week at a minimum wage. So we are not claiming, if you will, that she is, you know, an invalid in a wheelchair unable to do any work. What we are claiming is that there is a reduced capacity to work based on, you know, the crime, the Chapter 110 violations that she has experienced.

She is not going to become a school teacher. And let me just, again, digress briefly to inform the Court on how this information was arrived at because I was part of this discussion, and I have testified about this specific issue.

Dr. Smith interviewed Dr. Cooper – excuse me, Dr. Silberg, got the numbers about therapy, plugged those into his charts, and arrived at a number. Dr. Smith then interviewed me and got some background on the victim and her family in terms of vocational ability and history. And, again, he talks about these

in his reports, but I will briefly summarize what was important to him.

[75] He asked what – you know, whether her parents were employed, whether they had any educational background, whether they had any degrees or certifications. And, in fact, her father is a licensed plumber and an electrician. Her mother is a registered nurse. Her brother has also completed a trades course. I believe he is an electrician or a licensed plumber. And my client was enrolled and engaged in college as a freshman. And her stated vocational desire was to be a nurse – excuse me, was to be a school teacher or a psychologist.

And when we were discussing those vocational goals, Dr. Smith's assistant looked at the chart, Bureau of Labor chart for school teacher and he looked at the Bureau of Labor chart for the average woman in the U.S. work force and found that those numbers were pretty much the same; those income levels were the same. So I said take the lesser of the two and we will base it on that. So what you are seeing there, the vocational, the basis for the lost income, is really based on not, you know, a lawyer or a doctor or a psychologist or anything like that; but the average woman working in the U.S. labor force. So that is those amounts as a baseline.

And then we discounted it. We offset it based on my client's ability, whether she does or not, to work at a minimum wage job 15 hours a week.

THE COURT: What support is there in the record that [76] that is all she could work?

MR. MARSH: I believe he based that on his discussion with Dr. Silberg, and she has actually testified about this – not that I have heard her testimony, but I know she has testified about this. She would be more appropriate to address that issue, as she did in the two Florida cases. But just, you know, we are being conservative, and we are not presenting a case to the Court saying our client is never going to work, she is an invalid, it is impossible, she is a vegetable. We are saying, you know, she was on this road.

She is derailed, and all she can do is 15 hours a week. Again, Dr. Silberg would be more appropriate to address that particular question. But it is just important for the Court to know that we are not alleging or arguing for total disability in that respect.

And what Mr. Baldwin then says is, well, you know, if she couldn't work let's say – where are we now, 2010. Let's say we are in 2010. Let's just forward it a year. And my numbers are based on 2009 and the defendant didn't get arrested until 2010, what Mr. Baldwin is saying should he be liable for my client's losses quote, unquote in 2009, which has occurred before his criminal activity? In other words, breaking it down even further let's say that her loss package of lost income and psychological damages, lost therapy was 10,000 – let's say $10,000 a year for the next –

[77] THE COURT: So, in other words, you are saying under this approximation there would be a sliding scale based upon when the guilty plea occurred or based upon when the evidence shows that the violation first occurred?

MR. MARSH: I believe that is his concern, and I think it is a legitimate concern from a constitutional standpoint.

THE COURT: Okay.

MR. MARSH: So I don't know where that leaves us, but clearly these are the issues that the Court needs to grapple with.

THE COURT: And those are – the three that you have mentioned, joint and several, the Masha's – applying the copyright type $150,000, and then the amortization?

MR. MARSH: That's correct, Your Honor. And when I brought this up to Dr. Smith he is like, well, each defendant is like a cancer cell, this is a life plan, it is a global amount, they should all be liable for everything; but clearly with all his charts and tables, he would be the sort of person who does that type of analysis to address that specific concern to the Court. Is it utilized? It is useful? Has he done it in other cases? How would it be done? You know, what would be the mechanism, et cetera, et cetera.

* * *

[81] THE COURT: Well, in some cases through whatever means – your client Amy had the ability to hire very competent forensic psychologists and economists, but I have two other cases here involving four minors who don't have that ability and where are they left if there is not some vehicle to provide? Should they just not have their day in court?

MR. MARSH: No. Absolutely, Your Honor, they should. And, you know, I think this is an interesting question for the national amicus organizations to address. You know, as a gut reaction there is money out there. There is state crime victims funds that are used to provide this. I know a lot is made of the $6,000, you know, paid by the uncle in this case. The reality of that is that that money was used by the Government to hire a forensic – she wasn't a forensic psychologist. She was a counselor – to help in the sentencing. So that was sort of a time-limited, you know, counseling that was coordinated by the U.S. Attorney's Office there in Pennsylvania. So the restitution in that case was sort of used to provide that information to the Court.

* * *

[85] . . . know, several dozen identified victims. There weren't that many. So I was thinking there were 10, 15, 20 identified victims. Now, the National Center, who is the most accurate source of this information, has provided the first definitive numbers that I have seen about the number of 2,000 identified victims. Obviously not all of them will be in every case.

So that is – and the vast majority from my research into this issue is that the vast majority of those victims are minors, so they have yet to reach their 18th birthday. I know of a couple other victims that have reached majority, that have turned 18. But my sense is that the vast majority of those victims, the 80 percent of the 2000 that are in this country are minors. And in my discussions with the Justice Department and other sources, the vast majority of those victims, of the 80 percent of the 2000 that have been identified, many of them have opted out of even receiving notices because – well, I don't know why. But for whatever reason, the vast majority of them – you can opt out of the victim notification system. So you can say don't send me anything –

THE COURT: You get tired of getting the letters, bring the memories back up?

MR. MARSH: Right. And I have heard talks of mothers having filing cabinets in the basement that they throw these things into, and they pile up.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

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October 6, 2009

Mr. Buck Files
Attorney at Law
109 W. Ferguson
Tyler Texas 75702

Dear Mr. Files:

Enclosed is my preliminary report in the Doyle Paroline case. The report is entitled "preliminary report" because, if I receive any additional information or if any errors are found, I will make modifications in the report before giving my testimony in court.

There are two economic analyses of "Amy's" earning capacity. The first analysis examines the tax-adjusted, discounted present value of the total potential earning capacity of Amy as a college graduate and elementary school teacher. The second analysis examines the discounted present value of the total potential earning capacity of Amy as a high school graduate. After calculating these earning capacity scenarios, I have shown the lost potential earning capacity based on three possible mitigating income scenarios.

If there are other economic aspects of this case that you wish for me to examine, I will be pleased to work with you concerning such matters. Thank you for the opportunity to work with you on this case. I look forward to working with you in the future as we approach the date of the trial.

Yours sincerely,

/s/ Kent Gilbreath
Kent Gilbreath, Ph. D.

E-Mail: Kent_Gilbreath@Baylor.edu
Website: http://business.baylor.edu/Kent_Gilbreath/

NARRATIVE OF ECONOMIC ANALYSIS RE: "AMY"

PREPARED BY DR. KENT GILBREATH

NARRATIVE OF THE REPORT

Re: In the United States District Court for
the Eastern District of Texas, Tyler Division;
United States of America vs. Doyle Randall Paroline;
Case No. 6:08-CR-61

My Assignment in This Case

The purpose of this report is to assess the pecuniary value of "Amy's" past and future potential earning capacity. I have also been asked to discuss the role of economics in estimating and assessing potential "hedonic damages" (a.k.a. "value of life" damages.)

My Qualifications

My qualifications to serve as a forensic economist/ expert witness in this case may be seen in my resume, which is attached as "Appendix C" to my report. However, as a brief summary of my background, some of the important elements of my qualifications include:

1. Education: Ph. D. in Economics from the University of Florida, 1971, GPA: 4.0.
   MA in Economics from Baylor University, 1968, GPA: 4.0
   BA in Economics from Baylor University, 1967, GPA: 3.75

2. Professor of Economics, Baylor University for the past 35 years. Teaching economic theory, economic history, energy economics, and environmental economics. The methodology and principles used in this report are used and taught in these classes.

3. Member of the Board of Directors of the Federal Reserve Bank of Dallas for seven years where I helped formulate monetary policy for the United States and to oversee the practices of banks and other financial institutions in the Southwest.

4. Appointed by the Chief Justice of the Texas Supreme Court to serve on the *Citizens' Commission on the Texas Judicial System*, which sought to develop Texas court reform proposals for the consideration of the Texas State Legislature.

5. Served as a practicing forensic economist for both plaintiff and defense for the past 30 years – working on hundreds of cases as an expert witness using the methodologies employed in this report. (Appendix D to this report lists the "style" of the cases for which I have testified at trial or given depositions during the past six years.)

6. Charter member of the National Association of Forensic Economists.

7. Peer reviewer (past &/or present) for the three leading journals in forensic economics: the *Journal of Forensic Economics*; the *Journal of Legal Economics*; and the *Litigation Economics Review*.

8. Member of the Board of Editors: *Journal of Legal Economics*.

Documents Reviewed

In preparing this report, I have reviewed numerous documents related to this case and have consulted source materials of data generally accepted and normally relied upon by economists for both forensic and non-forensic research purposes – including analyzing employment, earnings, interest rates, inflation rates, consumption patterns, and other activities customarily performed by professional economists. The case specific materials I have reviewed are:

1. May 1, 2009 Protective Order letter from James R. Marsh

2. Victim Impact Statement of Amy
3. Childhood Recovery Resources by Joyanna Silberg
4. Order on Defendant's Motion for Evidentiary Materials by Judge Leonard Davis
5. Stan Smith letter contain his "intake" form and retainer information
6. Stan Smith's letter dated August 15, 2008 containing his economic analysis in this case.

A list of other statistical sources I have reviewed and used in this report and their relevant citations are contained in Appendix A, the summary section of my report entitled: "Assumptions and Statistical Sources." Additionally, throughout this narrative of the report, I have identified the sources of data and information I have relied upon in formulating each of my opinions concerning the economic damages in this case.

Economic Analysis: Assumptions and Methodology

The economic analysis contained in this report is consistent with current practices in the field of forensic economics, and the methodology employed in the report has been used and accepted in court cases participated in by this author for the past 31 years. I have taught these methodologies in various classes at Baylor University, and they are used by me and other economists in non-forensic economic research. It is my opinion that the conclusions contained in the report reflect reasonable economic probability.

This report employs various economic information and assumptions in order to determine the value of lost potential income and benefits. These assumptions are discussed in detail below and source materials are contained in Appendix B.

Review of Assumptions in the Report

I. Life Expectancy:

A. At the time of the preparation of this report (2009), the average life expectancy of individuals with Amy's demographic profile and age (20years old) is 60 years.[1]

B. The life expectancy and the "worklife" expectancy of Amy are important variables used in measuring the scope of economic damages in this case.

C. Knowing Amy's life expectancy is necessary in measuring:

1. The present value of her lost potential income and benefits

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[1] *United States Life Tables, 2004*; Department of Health and Centers for Disease Control and Prevention, National Center for Health Statistics, Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics, National Vital Statistics System, Volume 53, Number 6, November 10, 2005. Convenient access to this source for life expectancy is found at the website:

http://www.cdc.gov/nchs/data/nvsr/nvsr56/nvsr56_09.pdf

A copy of the life expectancy table used in this report is attached in Appendix B.

II. Worklife Expectancy:

The worklife expectancy assumptions used concerning Amy are based on the two earnings capacity scenarios examined in this report. The first scenario is based on the assumption that Amy would have graduated from college and would have become an elementary school teacher. The second scenario is based on the knowledge that Amy is a high school graduate with one year of college. In these two scenarios the average worklife expectancies are: 1) as a college graduate beginning work at age 22, she would have had an average worklife expectancy of:

35 years[2]

And as a high school graduate with one year of college beginning work at age 20, she would have an average worklife expectancy of:

35 years

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[2] *Worklife Estimates: Effects of Race and Education*, U.S. Department of Labor: Bureau of Labor Statistics, February 1986, Bulletin 2254; *Worklife Estimates: Effects of Race and Education*, U.S. Department of Labor: Bureau of Labor Statistics, February 1986, Bulletin 2254; Kurt V. Krueger: Tables of Inter-year Labor Force Status of the U.S. Population (1998-2004) to Operate the Markov Model of Worklife Expectancy, Journal of Forensic Economics, pp. 313-381, December, 2005. Gary Skoog and Ryan E. Ciecka: The Markov (Increment-Decrement) Model of Labor Force Activity: Extended Tables of Central Tendency, Variation, and Probability Intervals, Journal of Legal Economics, pp. 2387 Spring/Summer 2001. A copy of the worklife expectancy table used in this report is attached in Appendix B.

A. Knowing Amy's worklife expectancy is necessary in measuring the present value of her future potential income and benefits.

B. In light of the multiple elements of loss related to lost income and benefits, the worklife expectancy of an individual is often more critical to the measurement of economic loss than is life expectancy

C. The Federal government has prepared worklife expectancy tables broken down on the basis of age, sex, race, and education.

1. These worklife expectancy tables are published in:

2. More recent studies of worklife expectancy have been published in the professional journals of the economics profession. The more recent studies do not show substantial changes in the worklife expectancy of men since the BLS 1986 study. However, due to significant social changes in recent years, there has been a substantial increase in the worklife expectancy of women in the United States.

III. Income Growth Rate:

A. Sources of increase in income:

1. When projecting wage increases into the future, it is important to understand the American labor market and the bases for rising money wages in the

U.S. economy – increases that are well documented by historical evidence.[3]

a. Historical data indicates that workers at all levels have experienced growth in earnings.

i. There are several explanations for this increase but the two main sources of income growth are:

- Increases caused by inflation
- Increases in worker productivity

ii. Other factors contributing to increases in wages include:

- Seniority
- Promotions
- Collective bargaining power

B. Inflation and income growth:

1. Inflation is the main cause of increases in wages in recent history.

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[3] Average weekly earnings of production or nonsupervisory workers on private nonfarm payrolls by industry sector and selected industry; U.S. Dept. of Labor, Bureau of Labor Statistics; See http://stats.bls.gov/webapps/legacy/cesbtab3.htm. A copy of the income growth table used in this report is attached in Appendix B.

2. If inflation's impact on wages were not accounted for in this report, it would be as if an individual contracted to work the remainder of his or her life without any pay raises.

3. The average compound rate of growth in the consumer price index, 1970-2008[4]:

4.48%/Year

C. Productivity

1. In addition to increases in income caused by inflation, salaries and wages also rise because of increases in worker productivity

2. Productivity-based increases in wages result from a worker producing a growing quantity of goods or services

a. Productivity increases occur primarily because of improvements in technology, which increase workers' output.

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[4] Consumer Price Index, All Urban Consumers, U.S. City Average; U.S. Department Of Labor, Bureau of Labor Statistics, Washington, D.C. 20212; See: ftp://ftp.bls.gov/pub/special.requests/cpi/cpiai.txt

In forecasting future trends based on historical data, it is important to use data from a relatively long time period. This applies to interest rates, inflation rates, productivity growth rates, individual earnings history, and other data used in analyses. A statistically significant national economic trend needs at least 15 years of data, and I prefer to use a minimum of 25-35 years of data whenever possible.

b. Productivity growth of worker's may also come from increased experience

c. To assume that wage growth would be zero in the absence of inflation is to assume that there would be no increases in worker productivity

D. Education

1. There is a high correlation between education and lifetime earnings.[5]

a. This suggests a relationship between education and productivity.

2. In addition to the higher income levels associated with higher levels of education, the higher the educational achievement of an individual the larger the number of potential job opportunities, which should positively affect lifetime earnings.

E. Statistical Cohorts and Income Growth

1. Economists need statistical information to make economic forecasts concerning an individual's income growth.

2. Two important factors determining future income growth are:

a. The individual's earnings history

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[5] "Money Income of Households, Families, and Persons in the United States"

b. The earnings history of all individuals in the same or a similar industry

3. When individuals have little or no income history or their historical income growth is not a good indicator of their future income growth, it is often necessary to estimate their future earning capacity comparing to the relevant demographic, statistical groups into which they fall or could have been expected to fall.

   a. To project the economic losses of an individual, he or she can be viewed as part of a group (statistical cohort) when classified by age, sex, race, education, occupation, and possibly other factors.

4. When one looks at an individual as a member of a large group of similar people, as mentioned above, data is available showing historical income growth rates of the group.[6]

   a. The economist can use this data to estimate an individual's future income growth based upon the group characteristics applied to the individual.

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[6] Historical Statistics of the United States, Colonial Times to 1970; Statistical Abstract of the United States.

b. This "statistical cohort" data is not gathered primarily for use in litigation, but for other important purposes like forecasting employment needs, studying wage trends, tracking labor force changes, and many other purposes.

F. An income growth rate reflecting the average American wage growth rate in weekly wages for 1970-2008 was used in this report when analyzing the future earning capacity of Amy:

4.2%/yr.[7]

IV. Benefits

A. In modern society, employment benefits are a substantial part of total employee compensation and must be addressed and measured carefully in any evaluation of economic loss. In this report, it is assumed that Amy would have received fringe benefits. The value of potential job-related benefits as a percentage of income used in this report is reflective of the benefits of an average American worker:

14.02%[8]

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[7] For source, see footnote three.

[8] The table "Benefits as a Percentage of Income", which shows average benefits rates in various industries 2007, is attached to this report in Exhibit B. This table is from the United States Department of Labor, Bureau of Labor Statistics,

(Continued on following page)

V. Discounting and Discount Rates:

A. Courts require that estimates of the future value of economic damages be discounted to their present value.

B. Discounting to present value in this case refers to a mathematical procedure used to reduce future monetary losses to a dollar amount today, which, if invested will generate a flow of money in the future sufficient to restore the value of the lost income, benefits, and services of the individual.

C. The discount rate used in determining the present value of future income for Amy is reflective of the current legal requirement that future potential losses incorporate the impact of income taxes on lost potential earnings. The discount rate used in this report is based on the average tax-free rate of return of AAA municipal bonds, 1970-2008:

6.16%[9]

Employer Cost for Employee Compensation-March, 2007. Also, see website: http://www.bls.gov/news.release/pdf/ecec.pdf

[9] The table, "Municipal Bond Yields: AAA Moody Series, 1970-2008," is derived from *Interest Rates: Money and Capital Markets; Statistical Supplement to the Federal Reserve Bulletin; Federal Reserve*, Washington D.C. 20551. Also, see Federal Reserve System website: http://www.federalreserve.gov/Pubs/supplement/2008/12/table1.35.htm

D. Definition of discounting and present value:

1. Discounting to the present value is based on the proposition that a dollar to be received at some future date has a present value today of less than one dollar.

2. For example, would you rather have $100 today or $100 a year from today? Obviously, a dollar today is worth more than a dollar next year because interest can be earned on money received today. Failing to discount future economic losses would over-compensate a plaintiff because of the interest income earning capacity of a sum of money received today.

3. When discounting income and benefits to the present value, an amount is computed which, if invested, would allow a payout each year equal to the income, benefits, and services that were lost, and at the end of the normal life expectancy there would be a zero balance.

   a. The initial payouts from a fund will consist of substantial interest and less principal, while the latter payouts will mostly be principal.

   b. One's home mortgage payments work in a similar fashion.

E. Selecting a discount rate – the logic

1. In selecting a discount rate, it is important to remember that an individual has lost income earning capacity. In order to realize his or her full potential earnings and not be penalized, he or she must invest this money in such a way that it will yield a rate of return that will duplicate the projected lost potential earnings.

2. There is tradition among the courts that the discount rate should reflect the rate of return on assets that embody both safety of principle and safety of earnings. In this context, it is generally acceptable in litigation to assume that a recovering claimant would invest any recovered amounts in risk free instruments, such as U.S. government securities or high-grade municipal bonds.

3. Maximizing the rate of return or some other investment objective is secondary to insuring that income will be available in future years which can act as a substitute for the lost income.

    a. In this context, an appropriate discount rate is a rate of interest, which could reasonably be expected from safe investments made by an ordinary person without financial experience or skill.

b. In the context of the above consideration, and taking into consideration the need to consider the tax implications of lost potential income, I have used AAA municipal bonds for determining an income and benefits discount rate in this report.

F. Selecting a discount rate – the time period

1. The *time period* used in selecting an average discount rate is important because small differences in discount rates can produce large differences in present value calculations.

2. The behavior of the economy of the United States is less predictable in the short run than for longer periods of time.

3. Because interest rates are intertwined with inflation and other business cycle phenomenon, discount rates based on longer term interest rate averages tend to be more reliable than discount rates based on currently existing rates or short term averages.

4. I select a discount rate that I believe reflects a reasonably probable expectation of how interest rates will behave over longer periods of time.

G. To illustrate the complexity of interest rate behavior, in 1981, the prime interest rate was 21%. At that time, I was serving on the

Board of Directors of the Federal Reserve Bank of Dallas. If I had said to business and financial leaders at that time that 3 or 4 years later prime rates would be down below 10% or that in 12 years they would be 6%, few would have believed me, but that is exactly what happened.

H. Conclusion on the discount rate: The philosophy guiding my selection of the appropriate discount rate is that it should be the rate of interest that money invested safely and prudently by a person untrained in financial matters may be expected to earn.

VI. Personal Income Taxes

A. Federal and Texas law requires that some elements of loss in civil litigation be adjusted for the impact of income taxes.

B. Explanation of the percentage tax rate used in the analysis.

1. In order to adjust a loss for the impact of taxes, a percentage of potential lost income is deducted from the base income used in projecting future lost potential income.

2. Amy's income put her in a tax bracket where the average rate of taxation on her income as a college graduate would be 8.95% and, as a high school graduate 5.13%

VII. Summary of Opinions:

A. The opinions expressed in this report reflect a reasonable economic probability.

B. The present value of Amy's discounted total potential income and benefits (adjusted for taxes) is summarized below and may be seen in detail in the accompanying statistical analysis:

FUTURE POTENTIAL EARNING CAPACITY AS A COLLEGE GRADUATE:

$1,008,944

PAST & FUTURE POTENTIAL EARNING CAPACITY AS A HIGH SCHOOL GRADUATE:

$582,973

NET POTENTIAL PECUNIARY LOSS:

With no mitigating income: *$1,008,944*

With half-time work as high school graduate: *$717,457*
($1,008,944 – $291,486)

With full-time work as high school graduate: *$425,971*
($1,008,944 – $582,973)

PRELIMINARY REPORT

ECONOMIC ANALYSIS OF EARNING CAPACITY RE: "AMY"

PREPARED BY DR. KENT GILBREATH

"AMY"

SCENARIO I:

SUMMARY OF EARNING CAPACITY AS: ELEMENTARY SCHOOL TEACHER	
FUTURE EARNING CAPACITY:	$1,008,944

SCENARIO II:

SUMMARY OF EARNING CAPACITY AS: AVE. HIGH SCHOOL GRADUATE	
PAST & FUTURE EARNING CAPACITY (MITIGATING INCOME):	$582,973

NET LOST POTENTIAL EARNING CAPACITY:

LOSS WITH NO MITIGATING INCOME:	$1,008,944
LOSS WITH HALF OF MITIGATING INCOME:	$717,457
LOSS WITH FULL MITIGATING INCOME:	$425,971

POTENTIAL EARNING CAPACITY WORKING AS ELEMENTARY TEACHER

"AMY"

SUMMARY OF POTENTIAL EARNING CAPACITY: ELEMENTARY TEACHER

1.	**PRESENT VALUE OF FUTURE POTENTIAL INCOME:**	$884,884
2.	**PRESENT VALUE OF FUTURE POTENTIAL BENEFITS:**	$124,060
3.	**PRESENT VALUE OF TOTAL EARNING CAPACITY:**	**$1,008,944**

PRESENT VALUE OF FUTURE POTENTIAL INCOME

YEAR	FUTURE POTENTIAL INCOME	DISCOUNTED FUTURE POTENTIAL INCOME
2011	$17,550	$17,550
2012	$35,481	$33,422
2013	$36,971	$32,805
2014	$38,524	$32,200
2015	$40,142	$31,605
2016	$41,828	$31,022
2017	$43,585	$30,449
2018	$45,416	$29,887
2019	$47,323	$29,335
2020	$49,311	$28,793
2021	$51,382	$28,262
2022	$53,540	$27,740
2023	$55,788	$27,228
2024	$58,131	$26,725

2025	$60,573	$26,232
2026	$63,117	$25,747
2027	$65,768	$25,272
2028	$68,530	$24,805
2029	$71,408	$24,347
2030	$74,408	$23,898
2031	$77,533	$23,457
2032	$80,789	$23,024
2033	$84,182	$22,599
2034	$87,718	$22,181
2035	$91,402	$21,772
2036	$95,241	$21,370
2037	$99,241	$20,975
2038	$103,409	$20,588
2039	$107,752	$20,208
2040	$112,278	$19,835
2041	$116,994	$19,469
2042	$121,907	$19,109
2043	$127,027	$18,756
2044	$132,363	$18,410
2045	$137,922	$18,070
2046	$143,714	$17,737
Total		**$884,884**

PRESENT VALUE OF FUTURE POTENTIAL BENEFITS

YEAR	DISCOUNTED FUTURE POTENTIAL INCOME	DISCOUNTED FUTURE POTENTIAL BENEFITS
2011	$17,550	$2,461
2012	$33,422	$4,686
2013	$32,805	$4,599
2014	$32,200	$4,514

2015	$31,605	$4,431
2016	$31,022	$4,349
2017	$30,449	$4,269
2018	$29,887	$4,190
2019	$29,335	$4,113
2020	$28,793	$4,037
2021	$28,262	$3,962
2022	$27,740	$3,889
2023	$27,228	$3,817
2024	$26,725	$3,747
2025	$26,232	$3,678
2026	$25,747	$3,610
2027	$25,272	$3,543
2028	$24,805	$3,478
2029	$24,347	$3,414
2030	$23,898	$3,350
2031	$23,457	$3,289
2032	$23,024	$3,228
2033	$22,599	$3,168
2034	$22,181	$3,110
2035	$21,772	$3,052
2036	$21,370	$2,996
2037	$20,975	$2,941
2038	$20,588	$2,886
2039	$20,208	$2,833
2040	$19,835	$2,781
2041	$19,469	$2,729
2042	$19,109	$2,679
2043	$18,756	$2,630
2044	$18,410	$2,581
2045	$18,070	$2,533
2046	$17,737	$2,487
Total		**$124,060**

POTENTIAL EARNING CAPACITY AS: AVE. HIGH SCHOOL GRADUATE

"AMY"

SUMMARY OF POTENTIAL EARNING CAPACITY: AVE. HIGH SCHOOL GRADUATE

1.	**PAST POTENTIAL INCOME:**	$19,609	
2.	**PAST POTENTIAL BENEFITS:**	$2,749	
3.	**TOTAL PAST POTENTIAL EARNING CAPACITY:**		$22,358
4.	**PRESENT VALUE OF FUTURE POTENTIAL INCOME:**	$489,270	
5.	**PRESENT VALUE OF FUTURE POTENTIAL BENEFITS:**	$71,345	
6.	**TOTAL FUTURE POTENTIAL EARNING CAPACITY:**		$560,615
7.	**TOTAL PAST & FUTURE EARNING CAPACITY:**		**$582,973**

VALUE OF LOST PAST POTENTIAL INCOME

YEAR	PAST POTENTIAL INCOME
2009	$19,609
Total	**$19,609**

VALUE OF LOST PAST POTENTIAL BENEFITS

YEAR	PAST POTENTIAL INCOME	PAST POTENTIAL BENEFITS
2009	$19,609	$2,749
Total		**$2,749**

PRESENT VALUE OF FUTURE POTENTIAL INCOME

YEAR	FUTURE POTENTIAL INCOME	DISCOUNTED FUTURE POTENTIAL INCOME
2010	$20,433	$19,247
2011	$21,291	$18,892
2012	$22,186	$18,543
2013	$23,117	$18,201
2014	$24,088	$17,865
2015	$25,100	$17,535
2016	$26,154	$17,211
2017	$27,253	$16,894
2018	$28,397	$16,582
2019	$29,590	$16,276
2020	$30,833	$15,975
2021	$32,128	$15,680
2022	$33,477	$15,391
2023	$34,883	$15,106
2024	$36,348	$14,828
2025	$37,875	$14,554
2026	$39,465	$14,285
2027	$41,123	$14,021
2028	$42,850	$13,762
2029	$44,650	$13,508
2030	$46,525	$13,259
2031	$48,479	$13,014
2032	$50,515	$12,774
2033	$52,637	$12,538
2034	$54,848	$12,307
2035	$57,151	$12,079
2036	$59,552	$11,856
2037	$62,053	$11,637
2038	$64,659	$11,423

2039	$67,375	$11,212
2040	$70,205	$11,005
2041	$73,153	$10,802
2042	$76,226	$10,602
2043	$79,427	$10,406
Total		**$489,270**

PRESENT VALUE OF FUTURE POTENTIAL BENEFITS

YEAR	DISCOUNTED FUTURE POTENTIAL INCOME	DISCOUNTED FUTURE POTENTIAL BENEFITS
2009	$19,609	$2,749
2010	$19,247	$2,698
2011	$18,892	$2,649
2012	$18,543	$2,600
2013	$18,201	$2,552
2014	$17,865	$2,505
2015	$17,535	$2,458
2016	$17,211	$2,413
2017	$16,894	$2,368
2018	$16,582	$2,325
2019	$16,276	$2,282
2020	$15,975	$2,240
2021	$15,680	$2,198
2022	$15,391	$2,158
2023	$15,106	$2,118
2024	$14,828	$2,079
2025	$14,554	$2,040
2026	$14,285	$2,003
2027	$14,021	$1,966
2028	$13,762	$1,929
2029	$13,508	$1,894

2030	$13,259	$1,859
2031	$13,014	$1,825
2032	$12,774	$1,791
2033	$12,538	$1,758
2034	$12,307	$1,725
2035	$12,079	$1,694
2036	$11,856	$1,662
2037	$11,637	$1,632
2038	$11,423	$1,601
2039	$11,212	$1,572
2040	$11,005	$1,543
2041	$10,802	$1,514
2042	$10,602	$1,486
2043	$10,406	$1,459
Total		**$71,345**

APPENDIX A:
ASSUMPTIONS & STATISTICAL SOURCES

APPENDIX A:
ASSUMPTIONS & STATISTICAL SOURCES

INFORMATION AND ASSUMPTIONS SUMMARY:

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1. LIFE EXPECTANCY: 60 YEARS, FROM 2009 (AGE 20)

2. WORK LIFE EXPECTANCY AS HIGH SCHOOL GRADUATE: 35 YEARS, FROM 2009 (AGE 20)
   WORK LIFE EXPECTANCY AS COLLEGE GRADUATE: 35 YEARS, FROM 2011 (AGE 22)

3. AVERAGE ANNUAL WAGE INCREASES 1970-2008: 4.2%/YR

4. AVERAGE ANNUAL INFLATION RATES, 1970-2008: CPI 4.48%

5. AVERAGE ANNUAL BENEFITS 1970-2008: 14.02%

6. DISCOUNT RATE: 6.16% (1970-2008 AVERAGE RATE ON AAA MUNICIPAL BONDS)

A. *Life Expectancy Table*:

United States Life Tables, 2004: Department of Health and Centers for Disease Control and Prevention, National Center for Health Statistics, Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics, National Vital Statistics System, Volume 56, Number 9, Page 16 Convenient access to this source for life expectancy is found at the website: http://cdc.gov/nchs/data/nvsr/nvsr56/nvsr56_09.pdf

B. *Worklife Expectancy Table*:

Worklife Estimates: Effects of Race and Education, U.S. Department of Labor: Bureau of Labor Statistics, February 1986, Bulletin 2254, and Kurt V. Krueger: Tables of Inter-year Labor Force Status of the U.S. Population (1998-2004) to Operate the Markov Model of Worklife Expectancy, Journal of Forensic Economics, pp. 313-381. December, 2005.

C. *Average Weekly Earnings Table: 1970-2008*

U.S. Dept. of Labor, Bureau of Labor Statistics: Average weekly earnings of production or

nonsupervisory workers on private nonfarm payrolls by industry sector and selected industry detail.
Also, see website:http://stats.bls.gov/webapps/legacy/cesbtab3.htm

D. *Consumer Price Index Table: 1970-2008 (Inflation Rate)*

U.S. Department Of Labor, Bureau of Labor Statistics, Washington, D.C. 20212
Consumer Price Index, All Urban Consumers, U.S. City Average
Also, see website: ftp://ftp.bls.gov/pub/special.requests/cpi/cpiai.txt

E. *Benefits*

U.S. Department Of Labor, Bureau of Labor Statistics, Washington, D.C. 20212
Employer Cost for Emplooyee Compensation – March, 2007
Also, see website: http://www.bls.gov/ncs/ect/home.htm

F. Discount Rate

Municipal Securities:

Interest Rates: Money and Capital Markets, Statistical Supplement to the Federal Reserve Bulletin, March 2008; Interest Rate Tables, 1970 to 2008, and thereafter: Federal Reserve, Washington D.C. 20551
Also, see website: http://www.federalreserve.gov/Pubs/supplement/2007/02/table1_35.htm#fn10r

G. Taxes

"Individual Income Tax, All Returns: Adjusted Gross Income, Exemptions, Deductions, and Tax Items, by Size of Adjusted Gross Income and by Marital Status:" Individual Complete Report (Publication 1304), Table 1.2; Individual Tax Statistics, 2006, Internal Revenue Service.
See: http://www.irs.gov/taxstats/indtaxstats/article/0,,id=96981,00.html

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APPENDIX B:

SUPPLEMENTAL MATERIALS

Life table for white females: United States, 2004

Age	Expectation of life
0-1	80.8
1-2	80.2
2-3	79.2
3-4	78.2
4-5	77.3
5-6	76.3
6-7	75.3
7-8	74.3
8-9	73.3
9-10	72.3
10-11	71.3
11-12	70.3
12-13	69.3
13-14	68.3
14-15	67.3
15-16	66.4

16-17	65.4
17-18	64.4
18-19	63.4
19-20	62.5
20-21	61.5
21-22	60.5
22-23	59.5
23-24	58.6
24-25	57.6
25-26	56.6
26-27	55.7
27-28	54.7
28-29	53.7
29-30	52.7
30-31	51.8
31-32	50.8
32-33	49.8
33-34	48.8
34-35	47.9
35-36	46.9
36-37	46.0
37-38	45.0
38-39	44.0
39-40	43.1
40-41	42.1
41-42	41.2
42-43	40.2
43-44	39.3
44-45	38.4
45-46	37.4
46-47	36.5
47-48	35.6
48-49	34.7
49-50	33.8
50-51	32.9

51-52	32.0
52-53	31.1
53-54	30.2
54-55	29.3
55-56	28.4
56-57	27.5
57-58	26.6
58-59	25.8
59-60	24.9
60-61	24.1
61-62	23.2
62-63	22.4
63-64	21.6
64-65	20.8
65-66	20.0
66-67	19.2
67-68	18.5
68-69	17.7
69-70	17.0
70-71	16.2
71-72	15.5
72-73	14.8
73-74	14.1
74-75	13.4
75-76	12.8
76-77	12.1
77-78	11.5
78-79	10.9
79-80	10.3
80-81	9.7
81-82	9.1
82-83	8.6
83-84	8.1
84-85	7.6
85-86	7.1

86-87	6.7
87-88	6.3
88-89	5.9
89-90	5.5
90-91	5.1
91-92	4.8
92-93	4.4
93-94	4.1
94-95	3.9
95-96	3.6
96-97	3.3
97-98	3.1
98-99	2.9
99-100	2.7
100 or over	2.5

Center for Disease Control
National Vital Statistics Report Vol. 56, No. 9, Pg. 18
http://www.cdo.govinchs/datainvsrinvsr56/nvsr56.09.pdf

Years of Work Activity for Initially Active Women

Age	Less Than a High School Diploma	High School Diploma	Some College But No Bachelor's Degree	Bachelor's Degree But No Graduate Degree	Graduate Degree*
16	–	–	–	–	–
17	24.75	33.97	–	–	–
18	24.19	33.48	36.18	–	–
19	23.65	32.81	35.49	–	–
20	23.16	32.11	34.82	36.24	–
21	22.60	31.40	34.12	35.70	–
22	22.14	30.69	33.43	34.98	–
23	21.67	30.01	32.72	34.20	–
24	21.26	29.34	31.96	33.41	–
25	20.82	28.67	31.22	32.58	–
26	20.33	27.98	30.49	31.73	34.10
27	19.79	27.27	29.74	30.92	33.32
28	19.30	26.59	29.00	30.15	32.36
29	18.81	25.94	28.27	29.38	31.42
30	18.35	25.29	27.53	28.59	30.57
31	17.90	24.61	26.78	27.81	29.75
32	17.42	23.93	26.03	27.07	28.91
33	16.84	23.26	25.30	26.37	28.09
34	16.25	22.58	24.56	25.63	27.28
35	15.73	21.88	23.79	24.87	26.48
36	15.23	21.16	23.03	24.14	25.65
37	14.73	20.44	22.26	23.41	24.84
38	14.21	19.71	21.49	22.64	24.03
39	13.70	18.98	20.71	21.87	23.21
40	13.24	18.27	19.94	21.11	22.39
41	12.73	17.56	19.16	20.33	21.56
42	12.18	16.83	18.40	19.53	20.72
43	11.59	16.15	17.65	18.70	19.88
44	11.08	15.47	16.91	17.88	19.04
45	10.57	14.76	16.14	17.08	18.18
46	9.99	14.08	15.39	16.29	17.31
47	9.56	13.41	14.67	15.48	16.43
48	9.18	12.69	13.95	14.65	15.57
49	8.67	11.96	13.23	13.84	14.72
50	8.17	11.26	12.53	13.05	13.89
51	7.83	10.64	12.28	12.28	13.06
52	7.54	10.02	11.53	11.53	12.26
53	7.13	9.37	10.77	10.77	11.46
54	6.72	8.75	10.01	10.01	10.70
55	6.38	8.16	9.31	9.31	9.98
56	5.97	7.61	8.71	8.71	9.26
57	5.54	7.11	8.12	8.12	8.55
58	5.09	6.59	7.51	7.51	7.86
59	4.64	6.03	6.88	6.88	7.22
60	4.21	5.55	6.26	6.26	6.62
61	3.84	5.08	5.70	5.70	6.07
62	3.64	4.77	5.29	5.29	5.57
63	3.51	4.57	4.93	4.93	5.08
64	3.33	4.33	4.57	4.57	4.62
65	3.30	4.15	4.37	4.37	4.30
66	3.24	4.01	4.15	4.15	4.03
67	2.98	3.94	3.83	3.83	3.77
68	2.80	3.84	3.50	3.50	3.51
69	2.88	3.64	3.12	3.12	3.21
70	2.85	3.43	2.92	2.92	2.84
71	2.61	3.21	2.75	2.75	2.64
72	2.42	2.95	2.56	2.56	2.36
73	2.32	2.71	2.40	2.40	2.25
74	2.22	2.52	2.29	2.29	2.14
75	2.08	2.29	2.16	2.16	2.01

Tables of inter-year Labor Force Status of the U.S. Population (1998-2004) to Operate the Markov Model of Worklife Ex
Kurt v. Krueger
Journal of Forensic Economics, p313-381, December 2005

*Data in this column taken from:
The Markov (Increment-Decrement) Model of Labor Force Activity: Extended Tables of Central Tendency, Variation,
Gory R. Skoog and James E. Ciecka
Journal of Legal Economics, p23-87, Spring/Summer 2001

INFLATION RATES: THE CONSUMER PRICE INDEX, 1970-2008

YEAR	INFLATION RATE*
1970	5.6%
1971	3.3%
1972	3.4%
1973	8.7%
1974	12.3%
1975	6.9%
1976	4.9%
1977	6.7%
1978	9.0%
1979	13.3%
1980	12.5%
1981	8.9%
1982	3.8%
1983	3.8%
1984	3.9%
1985	3.8%
1986	1.1%
1987	4.4%
1988	4.4%
1989	4.6%
1990	6.1%
1991	3.1%
1992	2.9%
1993	2.7%
1994	2.7%
1995	2.5%
1996	3.3%
1997	1.7%
1998	1.6%
1999	2.7%
2000	3.4%

2001	1.6%
2002	2.4%
2003	1.9%
2004	3.3%
2005	3.4%
2006	2.5%
2007	4.1%
2008	0.1%
AVERAGE 1970-2008	4.55%
CPI INDEX: December, 1970	39.8
CPI INDEX: December, 2008	210.2
AVE. COMPOUND RATE	**4.48%**

*December to December rates

Source:
U.S. Department Of Labor, Bureau of Labor Statistics, Washington, D.C. 20212 Consumer Price Index, All Urban Consumers, U.S. City Average
See: ftp://ftp.bls.gov/pub/special.requests/cpi/cpiai.txt

AVERAGE WEEKLY EARNINGS, 1970-2008									
	1970	1980	1990	1995	2000	2005	2007	2008	AVE ANNUAL % 1970-2008
AVERAGE WEEKLY EARNINGS	$126	$241	$349	$400	$480	$544	$590	$608	4.2%
NATURAL RESOURCES & MINING	$166	$403	$603	$670	$735	$852	$962	$1,014	4.9%
CONSTRUCTION	$179	$351	$513	$572	$686	$751	$815	$842	4.2%
MANUFACTURING	$129	$284	$436	$509	$591	$674	$712	$724	4.6%
TRANSPORTATION	$221	$372	$472	$513	$562	$619	$655	$670	3.0%
PUBLIC UTILITIES	$233	$403	$670	$812	$956	$1,097	$1,182	$1,231	4.5%
RETAIL TRADE	$124	$182	$236	$273	$333	$378	$385	$386	3.0%
FINANCE, INSURANCE, REAL ESTATE	$112	$210	$355	$436	$537	$645	$705	$726	5.0%
PROFESSIONAL, BUSINESS SERVICES	$145	$248	$381	$426	$535	$618	$700	$738	4.4%
EDUCATION, MEDICAL SERVICES	$97	$190	$319	$378	$449	$545	$590	$614	5.0%
LEISURE, HOSPITALITY SERVICES	$53	$105	$152	$171	$212	$235	$265	$273	4.4%

U.S. Dept. of Labor, Bureau of Labor Statistics: Average weekly earnings of production or nonsupervisory workers on private nonfarm payrolls by industry sector and selected industry detail.

Website: http://stats.bls.gov/webapps/legacy/cesbtab3.htm

BENEFITS AS A PERCENTAGE OF INCOME, 2007

Category	All Workers	Construction	Manufacturing	Trade, Transportation, and Utilities	Finance, Insurance, and Real Estate	Professional and Business Services	Education and Medical Services	Leisure and Hospitality Services
Total Compensation	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%
Wages and Salaries	69.8%	69.46%	65.64%	71.06%	67.66%	73.28%	72.06%	78.49%
Insurance:								
Life	0.25%	0.19%	0.29%	0.19%	0.30%	0.22%	0.15%	0.01%
Health	11.26%	9.98%	13.95%	10.56%	10.81%	7.49%	9.73%	6.47%
Retirement and Savings:								
Defined Benefit	3.82%	4.70%	3.34%	2.39%	2.51%	1.67%	1.31%	0.22%
Defined Contribution	2.50%	2.47%	3.05%	2.58%	3.92%	2.54%	3.24%	0.99%
Total Benefits as Percentage of Income:								
Insurance and Defined Benefit Only	15.34%	14.87%	17.58%	13.14%	13.62%	9.38%	11.18%	6.70%
Insurance and Defined Contribution Only	14.02%	12.64%	17.29%	13.32%	15.03%	10.25%	13.12%	7.47%
Insurance, Defined Benefit and Defined Contribution	17.84%	17.34%	20.63%	15.71%	17.54%	11.92%	14.42%	7.69%

Source:

United States Department of Labor, Bureau of Labor Statistics, Employer Cost for Employee Compensation-December 2007
Also see: http://www.bls.gov/news.release/pdf/ecec.pdf

Note:

Percentages determined using 2007, 4th quarter data on the cost to employer per hour worked by employee

AVERAGE MUNICIPAL BOND YIELDS: AAA MOODY SERIES, 1970-2008

YEAR	MUNICIPAL BOND YIELD
1970	6.12
1971	5.22
1972	5.04
1973	4.99
1974	5.89
1975	6.42
1976	5.66
1977	5.20
1978	5.52
1979	5.92
1980	7.85
1981	10.43
1982	10.88
1983	8.80
1984	9.61
1985	8.60
1986	6.95
1987	7.14
1988	7.36
1989	7.00
1990	6.96
1991	6.56
1992	6.09
1993	5.38
1994	5.77
1995	5.80
1996	5.52
1997	5.32
1998	4.93
1999	5.28
2000	5.58

2001	5.01
2002	4.87
2003	4.52
2004	4.50
2005	4.28
2006	4.15
2007	4.13
2008*	4.97
AVERAGE 1970-2008	**6.16%**

Sources:

Federal Reserve, Washington D.C. 20551

Statistical Supplement to the Federal Reserve Bulletin, December, 2008

Interest Rate Tables, 1970 to 2007, and thereafter: Most recent data – December, 2008

http://www.federalreserve.gov/Pubs/supplement/2008/12/table1_35.htm

*Data from 9-26-08

EFFECTIVE TAX RATES, 2006 TAX YEAR

Size of Adjusted Gross Income	All Returns	Head of Household	Married Filing Separately	Married Filing Jointly	Single
All returns, total	12.75%	5.84%	15.90%	13.72%	12.05%
Taxable returns, total	13.76%	9.48%	16.00%	14.42%	12.66%
No adjusted gross income	-3.03%	*	-2.51%	-2.96%	-3.70%
$1 under $5,000	3.93%	*	*	*	3.88%
$5,000 under $10,000	2.57%	*	1.48%	*	2.58%
$10,000 under $15,000	3.29%	0.87%	3.21%	*	3.31%
$15,000 under $20,000	4.74%	2.00%	5.29%	0.67%	5.13%
$20,000 under $25,000	5.70%	3.19%	6.35%	1.76%	6.69%
$25,000 under $30,000	6.54%	*	7.75%	2.91%	7.85%
$30,000 under $40,000	7.01%	4.07%	8.15%	3.97%	8.95%
$40,000 under $50,000	7.77%	5.49%	9.13%	5.04%	10.53%
$50,000 under $75,000	8.61%	7.54%	*	6.53%	12.76%
$75,000 under $100,000	9.50%	10.90%	*	8.23%	14.76%
$100,000 under $200,000	13.08%	14.70%	*	12.41%	17.01%
$200,000 under $500,000	19.82%	20.89%	*	19.61%	20.91%
$500,000 under $1,000,000	23.63%	23.75%	*	23.78%	22.63%
$1,000,000 or more	22.59%	22.20%	*	22.83%	21.32%

Effective Tax Rates calculated as taxes owed divided by adjusted gross income

*Insufficient data to determine an effective tax rate.

Source:

"Individual Income Tax, All Returns: Adjusted Gross Income, Exemptions, Deductions, and Tax Items, by Size of Adjusted Gross Income and by Marital Status;" Individual Complete Report (Publication 1304), Table 1.2; Individual Tax Statistics, 2006, Internal Revenue Service.

See: http://www.irs.gov/taxstats/indtaxstats/article/0,,id=96981,00.html

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

BEHAVIORAL MEASURES & FORENSIC SERVICES SOUTHWEST, INC.

REPORT OF RECORD REVIEW & ANALYSIS

October 13, 2009

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Re: United States of America vs. Doyle Randall Paroline (Case No. 6:08-CR-61)

Dear Mr. Files:

As you know, "Amy" is a 20-year-old female who has requested restitution from Mr. Paroline based on his of possession child pornographic images of her that were produced by her uncle when she was a pre-pubescent child. These images were obtained via the Internet by Mr. Paroline, who is currently incarcerated for the offense of Possession of Material Involving the Sexual Exploitation of Minors. "Amy" is represented by Mr. James R. Marsh of The Marsh Law Firm, PLLC. At the request of Mr. Marsh,

psychologist Joyanna Silberg, Ph.D. of Childhood Recovery Resources evaluated "Amy." In addition, at Mr. Marsh's request, economist Stan V. Smith, Ph.D. of Smith Economics Group, Ltd, conducted a loss analysis based largely on information/opinions provided by Dr. Silberg.

As the attorney for Mr. Paroline, you requested to the Court that "Amy" undergo a face-to-face forensic psychological evaluation. This request was denied; however, your request to review the underlying data relied upon by Drs. Silberg and Smith was granted. Absent the opportunity to conduct a face-to-face forensic psychological evaluation of "Amy," you requested that I conduct a review and analysis of records pertaining to this case from a forensic psychological perspective. In particular, you asked me to consider the opinions and conclusions of the other psychologist, Dr. Silberg.

The records reviewed and analyzed included the reports of Drs. Silberg and Smith, dated 11/21/08 and 9/15/08, respectively. In addition to their reports, other documents produced by Drs. Silberg and Smith were reviewed. In the case of Dr. Silberg, this included her handwritten notes as well as the raw test data from the psychological tests she administered to "Amy." Also reviewed were other documents that were reportedly relied upon by Dr. Silberg and/or Dr. Smith. Included within these documents were criminal records regarding the prosecution of "Amy's" uncle for his abuse of her as well as records from the mental health evaluation and treatment services

"Amy" received after her abuse by her uncle came to light. Finally, I also reviewed the transcript from the restitution hearing that took place on 8/20/09.

The primary objective of this report is to summarize my opinions and conclusions regarding Dr. Silberg's methods, opinions, and conclusions in this particular case. Prior to doing so, however, it must first be made clear that the opinions and conclusions expressed in this report are based on my review and analysis of the records provided, my training and experience, and a reasonable degree of psychological certainty. The conclusions and opinions expressed in this report might be amended if further information is reviewed. These opinions are entirely based on record review and analysis and not upon an individual, face-to-face psychological evaluation of "Amy." Again, such an evaluation was requested, but not authorized, by the Court. It should be made clear that my opinions are limited by the methodology of record review and analysis, and that if a face-to-face evaluation of "Amy" were conducted by this evaluator, the following opinions might be amended. Nevertheless, the methodology of record review and analysis has the advantage of allowing a forensic evaluator to objectively analyze a case such as this from many different points of view based on a variety of records, rather than relying solely on the self-report of the individual being evaluated.

Opinions & Conclusions:

For reasons that are outlined below, it is my opinion that the amount of weight that can be placed on Dr. Silberg's opinions and conclusions in this case is very limited. Given that the loss analysis conducted by Dr. Smith was based largely on the opinions and conclusions put forth by Dr. Silberg, it is also my opinion that the extent to which his findings can be relied upon in this case appears to be very limited. The five major reasons for my level of concern in this regard are as follows:

1. From the information reviewed and analyzed, concern appears warranted regarding the extent to which, in this case, Dr. Silberg successfully served the role of an objective forensic psychological evaluator, which appears to have been her expressed intention. One reason for this concern is that it appears Dr. Silberg performed some services (e.g., writing "Amy's" Victim Impact Statement for her) that are typically associated with that of a consultant whose role is to help one side be successful in a case, rather than that of an objective expert who has no advocacy interest in either side's position. Another reason for this concern is that there are indications that Dr. Silberg may have reached some important conclusions in this case prior to conducting her evaluation (e.g., that "Amy" had psychological issues and required long-term treatment).

Some of the more illustrative examples of the areas of concern noted above are found in Dr. Silberg's "Forensic Services Agreement," which she entered into with "Amy's" attorney, Mr. Marsh, prior to her first evaluation session with "Amy." Indeed, one of the first sentences in this document includes a statement by Dr. Silberg that expresses that her "purpose" is to educate Mr. Marsh, "Amy," and the Court, regarding Amy's "psychological issues." The concern here is that this sentence seems to include the assumption that "Amy" has psychological issues, even though at the point that it was created and then signed, "Amy" had yet to have even been evaluated. Of particular note is the statement in Dr. Silberg's "Forensic Services Agreement" with Mr. Marsh that indicates that one of her "primary tasks" would be to assist Mr. Marsh and "Amy" in "developing a Victim Impact Statement which can be used in court." In my opinion, even assisting in "developing a Victim Impact Statement which can be used in court" suggests an expert that is serving the role of an advocate attempting to assist one side in prevailing in a legal case, rather than that of an objective, impartial investigator, and other documents reviewed indicate that Dr. Silberg's level of participation was even greater than simply assisting in the writing. Indeed, the transcript from the restitution hearing that was held on 8/20/09 indicates that, although the reader would not know it by reviewing the Victim Impact Statement itself, it was

actually written by Dr. Silberg based on information "Amy" told her, and not by "Amy" herself. It is also of note that it appears Dr. Silberg wrote "Amy's" Victim Impact Statement prior to their last evaluation session, which reportedly took place on 11/10/08. This would seem to suggest that in addition to the Victim Impact Statement having been written by Dr. Silberg as opposed to "Amy," it was not written with the benefit of all of the information obtained during the course of the evaluation process.

Also of concern from Dr. Silberg's "Forensic Services Agreement" with Mr. Marsh is a statement that indicates that she will assist Mr. Marsh and "Amy" in "developing a treatment plan to provide long-term psychotherapy and treatment for ["Amy"]". This statement appears to represent another instance of assumption being made that "Amy" has psychological issues prior to her even being evaluated. Also inherent in this statement is the assumption that "long-term psychotherapy and treatment" would be required in this case, even though "Amy" had yet to be evaluated by Dr. Silberg. Indeed, the statement suggests that even prior to evaluating "Amy," Dr. Silberg was already of the opinion that "long-term psychotherapy and treatment" would be necessary. In contrast to such an opinion being formed prior to the evaluation, whether or not treatment is required, and the length of such treatment, should be reserved for the conclusion of the evaluation. Indeed, not all individuals

who have experienced trauma require, or even desire, psychological treatment, and of those who do, not all require long-term treatment.

2. Although consideration of objective sources of data is the hallmark of a forensic psychological evaluation, it appears, based in the materials reviewed, that Dr. Silberg relied very heavily on "Amy's" subjective self-report. As is discussed in more detail in a later section, this approach is of particular concern because Dr. Silberg did not administer psychological tests with well-established validity scales. Indeed, in the absence of such testing, compelling evidence to suggest that significant weight should be placed on "Amy's" subjective self-report is lacking. It is well established in the field of forensic psychology that the self-report of individuals being evaluated can be significantly influenced by their involvement in a legal proceeding where they potentially have much to lose and/or gain. Dr. Silberg, however, does not discuss in her report the potential influence of "Amy's" involvement in legal proceedings on the extent to which her self-report can be heavily relied upon.

   Of particular concern with respect to relying on "Amy's" self-report is the apparent presence of several inconsistencies between assertions in Dr. Silberg's report and/or in the Victim Impact Statement when compared with information found in Dr. Silberg's handwritten notes. For example, Dr. Silberg

appears to attribute "Amy's" reported lack of academic success to her sexual abuse history, although other possible explanations are found in Dr. Silberg's handwritten notes. With respect to high school, in the Victim Impact Statement that Dr. Silberg helped "Amy" prepare, it is noted that Amy failed anatomy because she "simply could not think about the body" due to the abuse she experienced. In apparent contrast to this, however, is that Dr. Silberg's notes appear to indicate that "Amy" expressed that she failed anatomy during her senior year of high school because she was "goofing off" with a female classmate. Further, Dr. Silberg's handwritten notes indicate that Amy expressed that even in the classes she passed, she tended to put off school work as long as possible and do her school work, such as papers, the night before they were due.

With respect to college, both Dr. Silberg's report and the Victim Impact Statement Dr. Silberg helped "Amy" create, focus on that "Amy" stopped attending classes shortly after a psychology class in which she saw movie about abused children. Dr. Silberg noted that the emotional reaction to this film was overwhelming to "Amy" and this led to her not attending class. It was further noted that she resorted to drinking "to forget the source of her fears," and that she was ultimately "forced to drop out of school." While "Amy's" reported reaction to watching this movie about abused children is mentioned in Dr. Silberg's notes, so are other apparently

important pieces of information regarding "Amy" leaving college that are not noted in either Dr. Silberg's report or in the Victim Impact Statement. For example, Dr. Silberg's notes appear to include admissions from "Amy" about having not been ready for college and that she was not responsible enough to get up and go to class. Although it will be discussed more in a later section, also of note here is that records reviewed regarding mental health treatment "Amy" received after the abuse against her originally came to light, indicate an apparent history of academic issues that date back to a very young age. For example, as a small child she was reportedly in special education for reading and had difficulty finishing her homework. She was also reportedly immature, tended to fidget, and had some problems related to expressive and receptive oral language. These apparent long-term academic issues documented in the available record were not mentioned in Dr. Silberg's report, but rather, Dr. Silberg focused on "Amy's" sexual abuse history as being the reason for her lack of academic success. Similarly, other pieces of information that are potentially relevant when analyzing "Amy's" academic career do not appear to have been fully considered in Dr. Silberg report (e.g., her family educational history).

Other inconsistencies between assertions in Dr. Silberg's report and/or in the Victim Impact Statement when compared with information found in Dr. Silberg's handwritten

notes were also found. For example, in the Victim Impact Statement, it is noted that "Amy" failed her freshman year of college and moved back home. In contrast, however, Dr. Silberg's handwritten notes appear to indicate that "Amy" dropped out of college and moved in with her boyfriend, but did not tell her parents that she had done so. Indeed, from the handwritten notes, it appears that her parents were not aware of what had transpired until they received a letter that indicated that "Amy" had not obtained any college credit for the semester.

Yet another area of inconsistency is that while Dr. Silberg's report attributes "Amy's" lack of vocational success to her sexual abuse history, there are other potential factors found in Dr. Silberg's handwritten notes. In particular, it appears that "Amy" was looking for a job at the time of her evaluation sessions with Dr. Silberg, but that factors such as being a "procrastinator" may have interfered. Also indicated in Dr. Silberg's handwritten notes is that Amy acknowledged that she is "picky about [her] jobs" and also expressed that she wanted to work with kids and did not want to "food serve." It is of note that this information suggests if sufficient effort is applied and procrastination avoided, "Amy" may indeed be capable of performing much more in the way of work activity that was suggested by Dr. Silberg and subsequently relied upon by Dr. Smith in his analysis.

Also of concern with respect to relying on "Amy's" self-report in the manner Dr. Silberg appears to have is that, as is typically the case in a forensic psychological evaluation, "Amy" was aware of how the outcome of the legal proceedings might impact her, and therefore, the likelihood of her putting forth a presentation that she believed would most likely lead to success from a legal standpoint was a possibility to be strongly considered. Indeed, Dr. Silberg's handwritten notes appear to indicate that "Amy" reported that "3 million" dollars in restitution was being sought and that her father said she needed to hire an accountant. While "Amy's" knowledge of the stakes involved in the legal proceedings does not necessarily mean that she put forth an inaccurate presentation of herself, it is certainly, given the circumstances, a possibility that should have been thoroughly investigated and in my opinion, based on the documents reviewed, this was not satisfactorily done by Dr. Silberg.

In summary with respect to this section, it appears that Dr. Silberg relied heavily on "Amy's" self-report despite the forensic nature of the evaluation and a variety of apparent inconsistencies regarding underlying reasons for issues such as academic and vocational problems. While it seems that Dr. Silberg's report includes details such as "Amy's" reaction to a movie regarding child abuse that she viewed while in her college psychology class, other details that are relevant, such as her "goofing off" during the

high school anatomy class she failed, being irresponsible by not getting up and going to her college classes, and being picky regarding her jobs, are not noted. Again, relying on self-report to this extent is especially problematic given the lack of psychological testing using well-established validity scales to assist in verifying that "Amy" was responding to the evaluation in an open and forthright manner.

3. As was already demonstrated to some extent in the previous section, it appears that Dr. Silberg inadequately considered alternative hypotheses and overly attributed problematic behavior (e.g., academic problems, vocational problems, alcohol abuse) to "Amy's" sexual abuse history, without fully exploring alternative hypotheses and considering that the cause of behavior is often multifaceted. For example, Dr. Silberg opined that "Amy" experienced problems with academic progress secondary to her sexual abuse history without mentioning "Amy's" history of academic problems, including special-education for reading, that dates back to when she was a small child. Also, as was noted in the previous section, issues such as "Amy" not being ready for school and failing to wake up for her classes was not noted. Another example of the failure to consider alternative hypotheses appears to be found with "Amy's" reported alcohol abuse problem. Indeed, while Dr. Spielberg indicated that "Amy" attributed the escalation of her drinking to feelings about her brother dealing with drug

addiction as well as to her recovery from sexual abuse, the possibility of a possible genetic predisposition to substance abuse, especially given her brother's history of substance abuse, was not discussed in the report. Of course, not all individuals who have substance abuse problems were sexually abused, and conversely, not all those who are sexually abused develop problems with substance abuse. Despite this, the reader of Dr. Silberg's report is left with the impression that Dr. Silberg is tying "Amy's" alcohol abuse to her sexual abuse without considering other possible influences as well. In total, based on review and analysis of the available records, it appears the Dr. Silberg was prone to solely attribute problems reported by "Amy" to her sexual abuse history, without fully exploring and discussing the potential influence of other relevant factors.

4. Psychological testing is typically of great value in forensic evaluations. Unfortunately, however, in this case Dr. Silberg administered only a very small battery of tests (i.e., two) that were inadequate due to the absence of well-established validity scales and because the tests were overly specific in nature.

   The objective of psychological tests most commonly used in forensic evaluations (a e.g., Minnesota Multiphasic Personality Inventory – Second Edition, Personality Assessment Inventory) have the benefit of excellent, well-researched validity scales, while also being broad-based, so that they

assess for a variety of potential psychological issues. The inclusion of well-established validity scales is important because they allow the evaluator to assess the response style of the individual taking the test to determine if they were exaggerating problems, minimizing problems, or being open and forthright. Being a broad-based test, rather than one designed to only assess a specific condition, is important because it allows the evaluator to consider alternative hypotheses for behavior by assessing the presence or absence of variety of psychological disorders.

The only psychological testing performed by Dr. Silberg was with the Trauma Symptom Inventory (TSI) and the Dissociative Experiences Scale. Of these two tests, only the TSI has a validity scale that assesses the test-taker's response style, and unfortunately multiple research studies have expressed concern regarding the quality of this validity scale. Further, the TSI and Dissociative Experiences Scale are very specific tests, with the TSI focusing on posttraumatic stress issues, while the Dissociative Experiences Scale deals with dissociative experiences. Neither of these tests adequately explores a broad range of potential psychological/personality problems. While these tests could be used in a forensic psychological evaluation as part of a larger test battery that also includes one or more broad-based tests with well-established, well-researched validity scales, it is my opinion that these tests used alone in the manner that they

were in this case are inadequate because they do not allow for a valid assessment of whether the individual was being open and forthright during testing, nor does it allow for an exploration of a variety of diagnostic possibilities. Diagnostically, Dr. Silberg's report discusses posttraumatic stress and dissociative symptoms on the part of "Amy." The extent to which such symptoms are actually present; however, has, in my opinion, not been adequately established due to the inadequacy of the psychological test battery that was administered.

5. Finally, it is my opinion that Dr. Silberg's conclusions regarding the impact of "Amy's" abuse history on her over the course of her lifetime, and regarding the amount of treatment she will require in the future, is highly speculative and seems inconsistent with the results of her prior period of treatment. Indeed, as is noted in Dr. Silberg's report, "Amy" underwent psychotherapy with Ruby Salazer, LSW, BCD from 10/98 until the end of 1999, and Ms. Salazar's notes indicate that by the conclusion of this treatment, "Amy" was "back to normal." If Amy has had any additional treatment since 1999, it is not noted in Dr. Silberg's report. Despite this apparently good outcome during her previous experience in treatment, Dr. Silberg opined at the end of her report that "Amy" will require weekly psychotherapy over the course of her lifetime. In addition to "Amy's" prior treatment success appearing to indicate the potential for successful treatment of a much

> shorter duration than recommended by Dr. Silberg, if treatment is indeed needed, it should be noted that I am not aware of available research literature suggesting the need for weekly psychotherapy over the course of a person's lifetime. Indeed, it is my opinion that treatment of that length is highly unusual and very rarely recommended; especially in the case of an individual who is only 20 years old. Instead, the length of treatment depends on the individual's progress over the course of time. In addition to individual psychotherapy, Dr. Silberg opined that there will likely be periods where "more intensive inpatient rehabilitation services will be required over the course of her lifetime." Given that "Amy" has no history that I am aware of having received such services in the past, I am unaware of what the basis is for the speculation that such services will be needed in the future. Indeed, given her history, including her prior treatment history, it appears unlikely that such services would be necessary in the future.

Thank you for the opportunity to review and analyze the records in this case. Please let me know if you require further explanation regarding any of the information provided above. As was noted previously, if additional information becomes available, the opinions and conclusions found in this report my change.

Sincerely,

/s/ Timothy Proctor

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

UNITED STATES	§	
OF AMERCIA	§	
	§	CASE NO. 6:08-CR-61
VS.	§	(Honorable Leonard Davis)
DOYLE RANDALL	§	
PAROLINE	§	

STIPULATION

[Oct. 14, 2009]

It is stipulated by and between the Government and Doyle Randall Paroline who are the parties in this case and, also, by James R. Marsh who is, pursuant to 18 U.S.C. § 3771, "Amy's" representative that:

Any and all notices required to be sent by to the Government to "Amy" were received by Mr. James R. Marsh, "Amy's" representative.

Mr. Marsh did not pass on any of these notices to "Amy" or inform her that he had received them.

"Amy" does not know who Doyle Randall Paroline is.

None of the damages for which "Amy" is now seeking restitution flow from anyone telling her specifically about Mr. Paroline or telling her about his conduct which was the basis of the prosecution in this case.

Respectfully submitted,

/s/ Bill Baldwin

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RECORD AND BRIEFS

No. 12-8561

Supreme Court, U.S.
FILED
AUG 19 2013
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In The Supreme Court of the United States

DOYLE RANDALL PAROLINE,

Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT APPENDIX VOLUME II

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Petition For Certiorari Filed January 31, 2013
Certiorari Granted June 27, 2013

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

UNITED STATES OF AMERICA	) DOCKET NO.
	) 6:08cr61
-vs-	)
DOYLE RANDALL PAROLINE	) Tyler, Texas
	) 9:30 a.m.
	) October 28, 2009

TRANSCRIPT OF RESTITUTION HEARING
BEFORE THE HONORABLE LEONARD DAVIS,
UNITED STATES DISTRICT JUDGE

APPEARANCES

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Proceedings taken by Machine Stenotype; transcript was produced by a Computer.

[18] MR. FILES: Even though the Government has conceded that a proximate cause, proximate result requirement in the cases which they have set forth in their brief, they continue to urge the Court to rely on Ferber and Ashcroft and Norris in support of their request for an order of restitution. And our reply briefly noted these cases were not concerned with restitution issues, yet the Government has produced no authority in these cases.

The Government and Mr. Marsh seek an order from this Court requiring Mr. Paroline to pay restitution to an individual who knew nothing about him or his conduct and who can show no harm suffered by her attributable to Mr. Paroline. In Hughey v. United States, the Supreme Court set the standard for an order of restitution. It must be for a loss caused by the specific conduct that is the basis of the offense of conviction.

The Government keeps talking in terms of Mr. Paroline stepping into the room. The problem is that their stepping-into-the-room argument suggests that Mr. Paroline make restitution for someone else's offense of conviction.

Now, I learned long ago that one should never challenge a Court and one should never step on the Court's robe. The Court has asked a broad question – or a specific [19] question, which I will reply to or attempt to reply before going on. I don't want to get away from this. The 3rd, 6th, and 9th Circuits are consistent. You have got opinions which we have cited

and which the Government has cited. The statute is clear.

If the Court chooses to follow the established law, to follow the statute that is before the Court, then we, I believe, are in good shape and we walk away with no order of restitution. If the Court is so repulsed by pornography and by those who deal in pornography and is so sympathetic to victims of pornography, which we are all sympathetic to them, and chooses to ignore what appears to me to be the settled law and ignore the specific provisions of Section 2259, then this Court is going to order restitution, and I guess another court will have to make a decision on whether or not that is appropriate.

If you strictly construe Hughey and 2259, you can't get to a restitution award in this case because you don't have offense of conviction, harm, proximate cause, proximate result, there is no link, Amy can't show any problem; and the only way you get to a restitution order is if you ignore the settled case law and apply strict liability.

* * *

[22] THE COURT: I understand that. But before you go into that, which is what I thought I said you were going to go into, I would like to hear a response to your causation argument so that I can consider those one at a time.

MR. BALDWIN: Yes, Your Honor.

THE COURT: Mr. Baldwin.

MR. BALDWIN: I will confess that at the beginning of this process a number of lawyers got together in our office, and we attempted as best we could to work through the case law and interpret the statute within the requirement that we have in pursuing restitution on behalf of the victim. At the – we filed our brief, and then at the previous hearing, I indicated that even up to that point our understanding of the statute and the crime and how this whole thing operates was evolving, and I confess that it continues to evolve all the way up through last night and this morning in the sense that I struggle with this issue of attempting to place causation at the point of the conduct itself because if we try to do that or if we do that, it makes it almost impossible to address the issue.

I'd like to start off with one simple thing. Amy knows the crime occurred because the crime is represented in [23] the photographs that went out through the Internet. The crime was her sexual abuse that occurred at a very young age. Mr. Paroline possessed the evidence of the crime and in effect possessed the crime itself. He possessed that for his enjoyment. So that is a given. We are not arguing that whatsoever.

Now, Amy was very young when she was sexually abused, and these photographs were taken. Now, as we have seen and briefed and talked about at length is the fact that the damages themselves really don't present themselves completely at such a young age. In fact, I know that this Court and I and many others are struggling with the issue of production right now

of very young children and how do we assess their damages at that point in time.

Well, we have the benefit here of at least looking back in the past and having experts and having Amy represented by Counsel to explain what those damages are. And we can say for sure that that conduct that she experienced damaged her. There is no question about that.

THE COURT: Which conduct?

MR. BALDWIN: The original – I don't want to use the word "original" because it exists. The conduct of her sexual abuse which began and was documented at an early age and continues through this very day. It exists. It is there. And it is there for all of those to – who want to [24] participate in it, to participate in it. It exists on the Internet, which is unique in its characteristics and it is there. And for those – I will get to this point but let me make it now.

For those who want to go there and participate in that, then they should be held accountable. I really think – we cited the three cases of Norris, Ashcroft, and Ferber, and basically those cases explain what this whole thing is about, child pornography, how it is viewed and how we address this conduct.

But really maybe the statute is very simple, and we as lawyers are trying to read too much into it and analyze. And when you really look at 2259, it seems to say this simply – maybe it is not – maybe it is well written. At first we had a big debate, maybe it is not

well-written and it doesn't seem right. But it didn't seem to fit in our lawyer minds. But maybe it is fairly simple because it seems to say, and it doesn't distinguish between production, receipt, or distribution, or possession. It says all of those crimes are lumped together. And if anyone violates those statutes, then they are to be held accountable for the restitution to the victim. And it lists certain areas of restitution that are required to be paid.

Now, that seems fairly straightforward. So if at some point in time an individual possesses photographs of [25] sexual abuse, that person is going to be held accountable for all unpaid restitution that relate to those items listed in 2259. Now, the Legislature added in one final assessment of restitution. It said, oh, and by the way if the victim can also show damages that resulted directly from the conduct that we are talking about, you can add those in as well.

So in looking at the statute again this morning for I don't know how many times, it seemed to say to me given everything I have read, it is simple. If you want to involve yourself in this crime, you are going to pay restitution. And if your conduct resulted in additional damage to the defendant – or to the victim, you are also responsible for that.

THE COURT: Are you saying there is or is not a proximate cause requirement as to the items, other than subparagraph F.

MR. BALDWIN: Well, herein is my limitation on the understanding of proximate cause after

having read all of these statutes and cases, of course, the original conduct has to cause damages. But I don't believe that causation – once that is established, I believe that is the necessary causation.

Obviously, she could not come in – Amy could not come in and say without proof, I was damaged. She would have to establish that she was damaged as a young child.

[26] THE COURT: I don't think – and, Mr. Files, you don't disagree she was damaged by the original abuse, do you?

MR. FILES: No, Your Honor. The original abuse was horrible, she was horribly damaged.

THE COURT: All right. So we all agree on that. Now, what we are talking about is the photographing of that abuse and the sharing of that abuse over the Internet among various participants, including Mr. Paroline, right?

MR. BALDWIN: Yes, Your Honor. And my answer to the Court would be then once the original causation is established, then, no, I don't believe there is any requirement of causation as it relates to Mr. Paroline.

THE COURT: Okay.

MR. BALDWIN: And, again, it simply appears that from the 2259 if he participates in that event, which was documented and I have used the

term "frozen in time," he is responsible for any unpaid restitution.

Now, I would submit that he would have a good argument if all of the restitution or damages that had been – that are proven I think sufficiently before this Court had been paid. He wouldn't have to do that unless Amy could show that his specific conduct, as set forth in that final part of the statute, created additional damage resulting from his conduct. But in this particular situation, we don't have that –

[27] THE COURT: So you are saying that you are not buying Mr. Files' argument that you have to show specific causation that Amy knew that Mr. Paroline was viewing her photographs and relate the damages to that viewing?

MR. BALDWIN: I agree, yes, Your Honor, that is what I am saying.

THE COURT: And you disagree with that, Mr. Files?

MR. FILES: Yes, Your Honor. And I go back to the statute. I agree with Mr. Baldwin that different readings may come to different conclusions, perhaps. But I don't know how the Court gets around and I don't know how the Government gets around the definition for the purposes of this section. The term "victim" means "the individual harmed as a result of the admission of a crime under this chapter, and you read that in light of Hughey as the offense of conviction.

Now, clearly she was harmed in the past by God knows how many different people. Mr. Paroline is on the end of the chain. He is that guy that got the two pictures. He is sitting there looking at the two pictures. He may not have even have looked at them. He possessed the two pictures. That is his offense of conviction. She cannot under the state of the record be a victim under Hughey as defined in this statute. You have proximate cause plus you have the definition of "victim" plus you have Hughey.

THE COURT: Mr. Baldwin.

[28] MR. BALDWIN: Your Honor, I respect his position. Perhaps, Mr. Marsh could add to this particular –

THE COURT: Mr. Marsh, would you care to comment?

MR. MARSH: Your Honor, I apologize by appearing by – remotely today, and I thank the Court for allowing me to be heard. I have listened to both of these arguments, Your Honor, and I realize that in this case especially that established case law is going to be instructive, but it is not going to be dispositive. Because I think the Court realizes that we are somewhat on new territory with this kind of a crime and with this kind of a request for restitution for this kind of crime.

I think what is clear, however, is that, you know, there are victims of child pornography, possession, clearly the intent was to include that crime as a crime

subject to restitution. So however you want to make the argument, that crime qualifies as a crime for restitution. That is, in fact, what we are dealing with here is a case of possession.

Mr. Files said something very interesting, and much of my submission to the Court yesterday deals with this issue. And Mr. Files said that the defendant in this case was the last link on the chain. I agree with that. He is on the chain. Being on the chain is part and parcel of what we are trying to make out in terms of the very nature of this crime. Our supplementary material goes to that.

[29] I also want to say, without belaboring the point, there is a great deal of evidence that the sexual abuse, the activity that was engaged in, that everyone agrees is egregious and harmful, was in order to produce child pornography for willing consumers.

Again, our material that we filed goes to that argument and the research, all of it, is either Government research or peer review research, shows that this material is often created for the purposes of trading it for other child pornography. (The telephone cut out.) There is no reason not to believe that simple causation, in fact, is an appropriate standard, as Mr. Baldwin has made out, as we made out in our papers. There is an additional proximate cause provision in there for damages that are above and beyond simple causation in fact.

This is a recognized legal standard and actually I got this language from Texas state law where

apparently the legislature eliminated proximate cause in a lot of torts and relied simply on simple causation and fact for proving of damages.

Something that I am going to add here, Your Honor, is a case that I will put on ECF today, which is aptly called Snakenberg v. Hartford Casualty Insurance Co. It is state court out of South Carolina. You know, as the courts have recognized in these cases, all of the cases that we cite the [30] essential nature of this crime is a crime of privacy invasion of the children depicted. Snakenberg talks about wrongful intrusion into private affairs and the elements required to prove a wrongful intrusion, if you will, a privacy violation into personal affairs, which is just what this kind of crime is, and it is what Congress is trying to prevent in regulating it criminally.

But the most interesting part of this case, which I will, again, submit to the Court on ECF, is that the conclusion in the case, if the plaintiff proves the four elements needed, the cause of action, the fact of damages if established as a matter of law – in other words, if you prove that your privacy was invaded and you prove the elements of invasion of privacy, then damages are established as a matter of law. And in that, Your Honor, is what we are dealing with here, simple causation of fact, damages established as a matter of law, and then it is up to the Court, as they take about in Snakenberg, which I will provide, the amount of damages is to be assessed by the trier of fact.

In assessing the damages, the trier of fact may consider the same humiliation, emotional distress suffered by the plaintiff as a compensable elements of damage. I think this is very analogous to our current situation. Obviously we are bound by the criminal limitations. We are bound by the statutory language. But clearly all of the case law [31] recognizes this is one of privacy. And so we are not dealing with broken legs or car accidents or death, funeral expenses. We are dealing with in some ways intangible damages. When you are looking at these kinds of damages, you are looking for these kinds of privacy damages, I think they are directly relevant to this kind of pain.

THE COURT: So, Mr. Marsh, are you – do you – are you saying that other than paragraph F, the statute does have a causation requirement? And, if so, what type of requirement? Or that it does not have any causation requirement at all?

MR. MARSH: Your Honor, it would be folly for me to argue that we did not have to show harm caused by the commission of this crime. Clearly, it is not a strict liability, if you will, that, you know, if X then Y or you automatically are entitled to damages because of some, you know, statutory violation. We clearly have to establish harm. We clearly have to show harm by the commission of the crime. And I think that we have established harm by the commission of this crime.

Clearly this statute is different from the other statutes. I'm not going to belabor the point. The

MVRA talks about direct and proximate harm in its definition of "victim." The Victim Witness Protection Act, I believe it is called, talks about proximate and direct harm in order to be a [32] victim. That phrase, which is often referred to as the Hughey language is missing from this statute. This statute was passed after Hughey. Clearly, Congress knew about Hughey. It was a big issue back in the early '90s, and Congress passed this statute with some very specific language in light of Hughey. So clearly we have to show harm, and clearly I believe we have shown harm by the trading of child pornography, the possession of child pornography, the distribution issue of child pornography; and as Mr. Baldwin so aptly pointed out, the production of child pornography because if as Mr. Files admits, the defendant is on the chain, then he is on the chain. And the chain stretches all the way back into the place where these events first occurred for the purposes of supplying this material.

THE COURT: When you say does require harm caused by the commission of this crime, by this crime you are referring to his possession of two photographs?

MR. MARSH: Yes, Your Honor, I am.

THE COURT: And you are saying then – what harm was caused by his possession of the two photographs?

MR. MARSH: Well, harm as Dr. Silberg points out is analogous to an invasion of privacy. It is, in effect, the shame, the humiliation, the fear, and

paranoia that comes with this kind of knowledge that others known and unknown are interested in this kind of activity within the community. It [33] is not a broken arm. It is not, you know, something that you are going to need to be in traction or a cast for. It is like they talk about in Snakenberg, a crime of shame, humiliation, emotional distress; damages that are related to the knowledge that the victim can never overcome the original act which damaged them.

They are constantly being reminded, and they are constantly aware that these things are happening. I don't think you need to know – in fact, Mr. Files would probably argue that I have caused damage to the victim by telling her that the defendant engaged in this material; and that what she doesn't know can't hurt her. Clearly, that is, you know, a copout to say she didn't know – what she doesn't know can't hurt her. The reality is, as Dr. Silberg pointed out, she does know.

She doesn't know – and it is impossible to know all of the specific individuals and all of the specific individual acts they are engaging in, but she knows and she has known from a very young age – (telephone cutting out) – that they were being distributed on the Internet even as she was engaging in the act and that this is going to go on forever. So that is the nature of the harm, Your Honor, and that clearly is the harm of possession and receipt and distribution, and the supplementary materials that we submitted reviewed the academic and professional literature in

[34] this area. I think it is undisputed this causes harm.

THE COURT: Are you saying then that the totality of the harm that she has suffered from the entire abuse and the trading of the pornography, that an individual defendant such as Mr. Paroline who possessed two photographs should be held jointly and severally liable for that entire harm?

MR. MARSH: Well, Your Honor, I do think that. I think to create issues for the Court – I don't think it is easier for the Court to disaggregate and try to proportionalize it because the reality in proportionalization is, and others have pointed this out as a reason, why should we pay any damages because it is going on forever, and there is a million different defendants in the future and the past; and so, therefore, their proportional amounts should be very small, when the reality is I think Arledge really helps in this regard; and, yes, it is not a case under 2259; but clearly that Court was grappling with these same issues that you had if you were a bit player in the scheme and clearly was not the leader.

But what is his responsibility for the crime? The reality is a simplification is that when you seek to engage in this activity, which is illegal – for a very good reason. They all know it is illegal when they are engaging in it. When you join Al-Qaeda, when you join in these sorts of activities, then you are going to be held responsible and you [35] are going down a very dangerous path by engaging in the activity. And

one of the dangers of the activity is joint and several liability with all of the other individuals out there.

The additional – I will show the Court we are happy and we have made this available to the defendant, Mr. Files' attorney, to share the details of all of the other individuals engaged in this activity. We have the ability to generate a list, which we did, to Mr. Files last week with all of the names and all of the district courts and all of the case numbers of all of the individuals –

(Mr. Marsh is no longer on the phone.)

THE COURT: We lost you. Are you there?

All right. I was going to take a recess anyway for about ten minutes. We are going to take a ten-minute recess. We are going to see if we can get Mr. Marsh reconnected. I would like to hear just a couple more comments on this issue of the statute and causation. And then I would like to move to the issue of proof of restitution.

Be in recess.

(Recess was taken.)

THE COURT: Please be seated.

All right. Mr. Marsh, I believe we lost you mid-sentence. So if you still have your thought and would like to finish it, you may. If not, I have a couple of questions.

MR. MARSH: Your Honor, my thought was pretty much [36] finished when we got disconnected. Again, my supplementary material addressed most of the substance of my argument.

THE COURT: Let me clarify something in talking about you believe that a possessing defendant such as Mr. Paroline who has participated in the possession and exchange of child pornography involving Amy should be jointly and severally liable for the full amount of the harm that she has suffered as a result of the abuse and the publication of the abuse.

I want to be clear, and I think you have said this before that you are not seeking to have her made whole more than once; is that correct?

MR. MARSH: That is correct, Your Honor.

THE COURT: So whatever amount of harm she has suffered and will suffer in the future, once that amount is determined and once that is satisfied through various criminal cases and/or civil proceedings, then any criminal defendant would no longer be liable unless there was new harm caused?

MR. MARSH: That's correct. The way we explained it we are limiting our request to the numbers currently before the Court. I think the restitution statute is clear that we cannot, as you know, double-dip and get the same sorts of damages, if you will, in a civil case that we received in restitution. So we are in effect limited to our request before the Court.

[37] THE COURT: Okay. Before we move to the amount of restitution, Mr. Baldwin or Mr. Files, do you have anything further you would like to argue in response to what has been said regarding the causation issue or anything related to that part of the arguments?

MR. FILES: Yes, Your Honor we do. There is this talk about things evolving as though where we were today is something new and different, and it is different from where we were several years ago. I don't believe that is right. If the Court looks at the cases which the Government has cited in its brief and the cases we have cited in our brief: Crandon from 1999; Croxford, 2004; Danser, 2001; Doe, 2007; Dubose, 1998; Estep, 2005; Hughey, 1990; Julian, 2001; Laney, which is probably the one most cited, 1999.

This isn't an area where the courts have flooded us with opinions that are different from the 3rd, 6th, and 9th Circuit opinions which we have been talking about and which both of us have cited.

Additionally, one of the sections in my original brief was talking about the Fifth Circuit opinions following Hughey and Maturin, which is a 2007 case talking in terms that although the Supreme Court's decision in Hughey I predicated the enactment of the victim's rights and victim's protection, its holding – the holding that restitution must be limited to losses caused by the offense of conviction remains good law.

[38] So Hughey may be 19 years old, but it is still the law of the land and the law in this Circuit, and the cases that follow Hughey in this Circuit.

Lastly, at the risk of giving opposing Counsel even though he is only a representative the opportunity to talk more, Mr. Marsh is acknowledging that causation is required. If causation is required, an offense of conviction controls restitution, what is the specific harm she has suffered in this case and he cannot answer that question because there is nothing that he can tie to Mr. Paroline's conduct in this case.

He can talk globally about a victim in a child pornography case suffering forever, but that is not what we are about. We are about 2259 and Hughey and this case and the facts, and he cannot come under 2259 and put her in the posture of a victim as a victim is defined in that statute if the Court is going to strictly construe the law. That is a problem for Mr. Marsh, for the Government, and I would respectfully respect for the Court.

THE COURT: Mr. Marsh, do you care to respond?

MR. MARSH: The facts are before Your Honor, and you are going to have to make that call. I think we have shown cause. I don't think proximate cause is required. We have been over this ground before. Clearly Congress knew what this was talking about; that victims of child pornography are [39] entitled to restitution. The goal of restitution is not about the defendant. It is about the victim whole,

restoring the victim to the place she would have been if the crime had not occurred, and clearly the defendant engaged in this crime, and the crime of conviction is possession; and that is what we are here about.

All of the talk about Hughey is nice, but we agree, it is the crime of conviction, and the crime of conviction is possession, possession of child pornography. We need to show causation. Possession of child pornography by this defendant caused the victim's harm. I believe that we have done that. And that is going to be a call for the Court in reviewing all of the evidence.

* * *

[41] THE COURT: Let's move to what I would consider the second issue which the Court may or may not get to, depending on what it does with the first issue. But if the Court does find that the victim is entitled to restitution from Mr. Paroline, the question becomes, what is the amount of harm that she has suffered?

So, Mr. Files, you were about to get into that earlier as far as your response after receiving these materials. I will allow you to go first again if you would like to.

MR. FILES: Your Honor, if I had understood what the Court was suggesting earlier, I would have started off with that; but I just always just sort of start with the law and go to the facts, so I apologize

if I didn't cover what the Court wanted in the order the Court wanted it.

THE COURT: I think discussing the statute and law first was appropriate. Now, let's talk about the facts.

MR. FILES: It's going to take a little while, Your Honor, if you will bear with me. We have gone through a bunch of stuff which we like to talk to the Court about. When I say [42] a bunch of stuff, I am referring to the pertinently underlying data which we were furnished and which we have filed with the Court.

Again, we have filed everything under seal because of the protective order. We didn't want there to be any issue as to whether or not we had disseminated under the protective order to anyone other than the Court and Clerk and Counsel.

Since we last came together, we have received the underlying data from Mr. Marsh and are now in a position to intelligently argue – we hope it is intelligent, the restitution issue. Without that data we were like a blind man trying to find a ghost in the dark. With the data, it is though a light has been turned on.

To begin with, we look at the contract entered into between Mr. Marsh and Dr. Silberg. The first paragraph reads this way – and we will fill in the blank where there was a redaction with the word "Amy." "You are contracted with me to provide forensic services which will involve my expert psychological

opinion regarding your client Amy. My purpose will be to educate you, the Court, and the client regarding psychological issues. I will receive no funds based on the outcome of the cases that you are working on. One of my primary tasks will be to assist you and Amy in developing a victim impact statement which can be used in Court. I will also assist you and Amy" –

[43] THE COURT: Mr. Files, this is – for my clarification – this is written by Dr. Silberg to Mr. Marsh?

MR. FILES: That's correct. It is at the beginning of the appendix. It is the contract, and it is the first paragraph of the contract. And it is something that Dr. Proctor speaks to in his report, if the Court has had the opportunity to read that yet.

"I will also assist you in developing a treatment plan to provide long-term psychotherapy and treatment for Amy."

The breadth of the contract to educate you and educate the Court developing the statement which can be used in Court is somewhat different from what Mr. Marsh stated at the August 20th hearing. In 2007 he says, "When Amy turned 18 at that point in time she contacted my office directly to discuss again the notices and what the notices meant, and again providing legal advice concerning these notices. One of our first and primary goals from our work with federal law enforcement was to provide a victim impact for use at sentencing. I was not familiar at

that point in time with restitution and wasn't even thinking about restitution." This was 2007 and 2008.

"At that point we wanted to find a forensic psychologist to assist us not only in evaluating our client but also for the creation of a victim impact statement." He [44] left out that he was hiring her to educate the Court. He was hiring her to be an advocate. He was hiring her to develop a psychological plan before she made a determination as to whether or not Amy had any problems. She goes into this with a pre-conceived notion.

Interestingly, there is either a typographical error or she got into the case earlier than we thought. The date on the contract reflects it was signed on June 9th, 2007. We already knew that Dr. Silberg had spent some seven-and-a-half hours talking with Amy. What we did not know was her methodology. What we do not know was the contents of the meetings, and they are still difficult to ascertain.

Dr. Silberg's notes are 69 pages in length. They are handwritten. They are difficult to read on a good day. It is impossible to tell what questions were asked of Amy. Rather, there are notes as to what her answers are. Some of the notes are sentences. Others are phrases. Sometimes she uses her own shorthand and will only have two words or so which make little sense.

There was a misleading aspect of what she wrote in her statement, which is in her report which accompanied Mr. Marsh's request for restitution. Since the

Court – since trustworthiness is part of the restitution issue when we are looking at something from a Presentence Report, we want to go into five statements she makes.

[45] "Most significantly at the age of 17, Amy was informed through legal notifications about the widespread presence of her picture on the Internet illustrating to her that in some ways the sexual abuse of her has never really ended. This knowledge further exacerbated her symptoms, interfered with her ability to overcome the increasing symptoms of overcoming post-traumatic stress, and impeded her ability to move on with her life."

"She described that each new discovery of a new defendant retraumatizes her again. Despite some resolution of Amy's post-traumatic symptoms, when she was younger, Amy continues to have the hallmark features of post-traumatic stress disorder which include intrusive images, attempts at avoidance and denial and hyper-arousal. These post-traumatic symptoms and effects of sexual abuse are more resistant to treatment than those who would normally follow a time-limited trauma. As her awareness of the continued existence of these pictures and their criminal use in a widespread way leads to an activation of these symptoms."

And, lastly, "Secondly, treatment for post-traumatic stress involves protection from the triggers that stimulate memories of her abuse. In the case of victims of child pornography such protection from

triggers is not completely possible as the existence of the pictures themselves remain triggers, specifically Amy's awareness of these pictures, [46] knowledge of new defendants being arrested become ongoing triggers to her.

Now, these statements of Dr. Silberg, together with Mr. Marsh's statement that the defendant undeniably contributed to Amy's psychiatric death by a thousand cuts when he received and/or distributed her child pornography image with impunity until apprehended by law enforcement, in the language of the victim impact statement, certainly led Mr. Baldwin and me to believe that Amy knew of Mr. Paroline and his conduct before Mr. Marsh submitted his request for restitution.

Her victim impact statement talks about this defendant. Now, maybe the light should have gone off and we should have realized that this defendant maybe wasn't Mr. Paroline, but it was submitted in this case and this defendant or this person could only refer to Mr. Paroline. At the August 20th hearing, Mr. Marsh advised the Court in response to the Court's question that Dr. Silberg had written Amy's victim impact section which she had adopted after Mr. Marsh had deleted something, and we don't know exactly what it was, from her draft of the statement.

Mr. Marsh told the Court that Dr. Silberg had completed the statement after four interviews with Amy. That wasn't totally accurate as we learned from the underlying data. Mr. Marsh had sent a copy of the

victim's impact [47] statement to Assistant United States Attorney Slater on September 22nd in the Hesketh case. Dr. Silberg's report was completed on November 21st, 2008 after her fourth session with Amy.

Having read the underlying data in Amy's victim impact statement, I have concluded that it is difficult to reconcile the two. There is no doubt that Amy was sexually abused. There is no doubt that she suffered from this abuse. And there is no doubt that she suffered from this abuse, and there is no doubt that Dr. Silberg's underlying data reflects this.

However, there are enough inaccuracies as to some of the sentences into the victim's impact statement that it raises questions as to the other sentences, or stated in a different manner, there are enough problems with some of the statements to create concerns about the balance of the statements and the victim's impact statements and the validity and trustworthiness of this victim impact statement and of Dr. Silberg's report in support of Mr. Marsh's request for restitution.

Here are some specific examples from the victim impact statement: "Sometimes things remind me of the abuse, and I don't even realize it until it is too late. For example, I failed anatomy in high school. I simply could not think about the body because of what happened to me. The same [48] thing happened in college. I went to a psychology class where we watched a video about child abuse. Without even

realizing it, I just stopped going to class. I failed my freshman year of college and moved back home."

From the underlying data, unnumbered Page 28, "I was good in high school. I did papers the night before. Waited until the last day. Passed everything except anatomy. Goofing off. One girl named Brittany, we would goof off. Graduated general. College don't look at anything else. Didn't want to go. Wasn't ready. Ready for college yet? Not responsible enough to get up and go to class."

Continuing from the underlying data. "Dropped out after two months. Moved in with my boyfriend and didn't tell my parents." She didn't go home. Later came home – "A letter came home and said I had no credits. College for the semester, just wasn't ready. Lived there and didn't like it. Wasn't responsible enough. Slept in and missed."

From the victim's impact statement, "It is easy for me to block out my feelings and avoid things that make me uncomfortable. I don't know when I will be ready to go to college because I have huge problems with avoiding anything that makes me uncomfortable or reminds me of abuse."

From the underlying data, "100 or so perps, settlement of $100,000 per picture. Have to go back in 14 days or sue in court. Letter went out to 16 people. Not [49] about money, but hitting them where it hurts." Talks in terms of buying a car, going to college, giving money to charity.

From the victim impact statement, "I feel I am unworthy of anything and a failure. What have I been good for except to be used by others over and over. That is one of the reasons I haven't been able to get a job or stay in school." From the underlying data, "Difficult getting job! Picky about my job. I want to work with kids. I don't want to food serve." From the victim's impact statement, specifically she has experienced significant effects in the following areas: "Mood regulation, cognitive distortion, feeling of shame, blame, guilt, self-esteem, alcohol abuse."

From the underlying data, "I don't drink anymore." What Dr. Silberg's report doesn't contain is this: Many victims of sexual abuse are unable to ever have a meaningful relationship with a member of the opposite sex. Dr. Silberg fails to note that Amy is still in a long-term relationship with her boyfriend; that she is in love with her boyfriend. Apparently, she has a healthy sexual relationship with him because she believes she might be pregnant, but wasn't.

Dr. Silberg's report contains nothing which would support a conclusion that Amy's daily functioning is highly impaired or that she can work on a part-time basis only or that she is only able to do part-time, lower level work if she is able to work at all. It is not there. Why is it [50] important? Because Dr. Smith who was hired as the economist begins with that assumption.

Mr. Marsh talks about hiring Dr. Smith. Page 73, Lines 13 through 20. "Yes, and so what Dr. Smith – I

sort of said I needed some sort of – I don't know – things popped in my head. I need a forensic economist, and I Googled him, and he came up and I said I needed someone to break down all of the damages because I want to present the Court with – it's not me talking or adding – I want somebody else to add up these things and put some basis on them so we can present them to the Court in an expert way." And that is what Dr. Smith did.

Now, Dr. Smith indicates that he had an interview with Joyanna Silberg, and apparently it was only a telephone interview, and he had a case information form which we have filed with the Court. Mr. Marsh, as we have discussed, says he has given me everything, and I take his word for that. As the case information form reflects basic facts of the case and he goes into her being raped.

Thousands of people who have been convicted and sent to prison for possession or distributing her images. Her victimization is expected to last during and beyond her lifetime. Amy dropped out of college – it says "AM" – dropped out of college – when she discovered the extent of her victimization. She is unemployed and lives at home. She [51] is with her boyfriend. Her daily functioning is highly impaired. She will need lifetime therapy and economic support. She also smokes and has a drinking problem.

Now, this is in '77, '78. This was from '78 when Mr. Marsh was not thinking about restitution. I will attach the relevant restitution statute and 18 USC,

Section 2259. If there is a federal action specify – 18 USC 2255.

THE COURT: What are you reading from now?

MR. FILES: I am reading from a form entitled Case Information Form. It is an exhibit to what we have filed. It is what Dr. Smith furnished to Mr. Marsh, Mr. Marsh filled out and returned to him. And it is the foundation or assumptions which he was relying on when he wrote – when he began the report.

In contrast, we have furnished everything we had to Dr. Proctor, the whole ball of wax, what we got from Mr. Marsh to begin with, Dr. Silberg's reports, the underlying data, everything we could possibly have, and Dr. Proctor prepared a report, we furnished it to the Government, we filed it.

Dr. Proctor begins, "For reasons that are outlined below, it is my opinion that the amount of weight that can be placed on Dr. Silberg's opinion and conclusions in this case is very limited. Given that the loss analysis conducted by Dr. Smith was based largely on the opinions and assumptions put forth by Dr. Silberg, it is my opinion that the extent to [52] which his findings can be relied upon in this case appears to be very limited.

He then sets out five reasons, five major concerns over five-and-a-half pages. I don't want to read everything. I just want to hit the highlights on the first of each of these concerns. From the information

reviewed and analyzed, concern appears warranted regarding the extent to which in this case Dr. Silberg successfully served as an objective forensic psychological evaluator which appears to have been her express intention.

Second, although consideration of objective sources of data is the hallmark of a forensic psychological evaluation, it appears based on the materials reviewed, that Dr. Silberg relied very heavily on Amy's suggestive self-report.

Third, as was already demonstrated to some extent in the previous section, it appears that Dr. Silberg inadequately considered alternative hypotheses and overly attributed problematic behavior; for example, academic problems, vocational problems, alcohol abuse, to Amy's sexual abuse history, without fully exploring alternative hypotheses and considering the cause of behavior is often multi-faceted.

And in that, Your Honor, if you will look specifically at Dr. Proctor's report, he talks about her early childhood grades, her fidgeting things which occurred before [53] she would have been the victim of the sex offense in this case.

Fourth, psychological testing is typically of great value in forensic evaluations. Unfortunately, however, in this case, Dr. Silberg administered only a very small battery of tests, that is two, that were inadequate due to the absence of well-established validity scales and because the tests were overly specific in nature.

Finally, it is my opinion that Dr. Silberg's conclusions regarding the impact of Amy's abuse history over the course of her lifetime and regarding the amount of treatment she will require in the future is highly speculative and seems inconsistent with the results of her prior period of treatment. And continuing with that, given that Amy has no history that I am aware of of having received such services in the past, I am unaware of what the basis is for the speculation that such services will be needed in the future. Indeed, given her history, including her prior treatment history, it appears unlikely that such services will be necessary in the future.

In Mr. Marsh's supplemental filing, it is interesting he is asking for money for various persons that he doesn't have anything in there for someone who is counseling Amy at this time. It is inconceivable to me that a lawyer of Mr. Marsh's ability would not have had something in the papers [54] about – that he has furnished – about where she is doing counseling, who is doing it, what her progress is; and then Dr. Silberg did not make any notations of that. She is apparently someone that is so horribly messed up, and yet she has been put on a shelf and nothing is being done; or if it has been, nothing has been provided to the Court or to us.

We gave Dr. Gilbreath the protective order from the Court, the victim impact statement, the childhood recovery resources report of Dr. Silberg, the order for evidentiary materials furnished by the Court, Dr. Smith's letter which contained his intake form and

his report. Dr. Gilbreath, if the Court has noticed, came to totally different conclusions, assuming that all of the speculation was accurate about her – that she would normally have gone to college; that she could only do part-time work and the value of a high school education. He determined that her future potential as a college graduate would have been a little over a million, $1,008,944.00.

As a high school graduate she would have $582,000 worth of earning capacity. Potential loss if she had no mitigating income would be the full million eight thousand. If she worked half time, that her loss would be 717,000, and if she worked as a high school graduate she is going to make $425,000 in her life. Basically, he is so far off from what –

[55] THE COURT: Well, let me ask you – are you conceding the lower figures that Dr. Gilbreath has arrived at as being loss of earnings, harm that Amy has suffered?

MR. FILES: I'm saying that those are statistical, showing what someone would have. No, I am not saying she has suffered those. I am saying that is a statistic for someone whose net pecuniary loss with full-time work as a high school graduate would be 425.

We furnish these in comparison to what Dr. Smith said. We are not suggesting that Mr. Paroline should be required to pay any of those figures. We come back to –

THE COURT: Are you arguing that there is no loss of earnings shown, or –

MR. FILES: I am arguing that there is no loss of earnings shown in this case as a result of Mr. Paroline's offense of conviction.

THE COURT: Okay. Are you arguing – you are back to your causation argument. My question is, from an actual damages standpoint, are you arguing that Amy has not suffered any loss of earnings as a result of her abuse and the publication of that abuse?

MR. FILES: Of her original abuse and the publication of her abuse, no. We acknowledge that she has the potential to suffer loss, but we don't know what the amount is. We suggest that this is at least probably more accurate [56] than what has been submitted by the Government.

THE COURT: All right.

MR. FILES: In our first hearing we had filed an affidavit of Dr. French, which Mr. Marsh poo-pooed; that is to say, viewed with derision. Looking back now at that, it dovetails amazingly with the findings which Dr. Proctor has. Dr. Silberg presents a detailed description of her assessment and evaluation of Amy. Some of the conclusions that she draws are questionable.

The most striking observation that I was able to see was that Dr. Silberg attributed every difficulty this young lady has to the emotional trauma which she experienced as a result of her sexual abuse as a

child. Interestingly enough, the child responded well to her earlier therapy, as would be expected; however, the decline in her functioning seems to be precipitated by her being notified by the Government that she was an identified victim.

Second, it is not possible to predict specific long-term course and outcome of treatment for post-traumatic stress disorder. These cases appear to have a waxing and waning history and sometimes seem to simply remit over time with little or no treatment. To make the statement that this individual will require ongoing treatment for the rest of her life probably exceeds a clinician's ability to make such a statement.

[57] Nothing in Dr. Silberg's report supports a conclusion that Mr. Paroline's conduct has caused Amy any emotional trauma or that it has impacted her in any way. Ironically – and here Dr. French has the same belief that Mr. Baldwin and I did when we started off. Ironically, if the Government had not notified Amy of Mr. Paroline's conduct, Amy would have suffered no emotional trauma. Should Dr. Silberg's line of reasoning be accepted, then each and every time in the future that Amy is notified by the Government of a new case, she can be expected to be retraumatized and run the risk of a continuing deterioration of her present condition, but that didn't happen because she wasn't notified.

THE COURT: Mr. Files, let me – I'm having a little trouble following that argument because

Amy obviously knows that the photographs of her abuse are traded on the Internet, correct?

MR. FILES: Yes, Your Honor, we agree with that.

THE COURT: All right. And are you saying that in order for her to be harmed by – and I take it you would agree that she is harmed by having her photographs traded on the Internet?

MR. FILES: She is harmed by her knowledge that her photographs have been traded on the Internet?

THE COURT: And are being traded.

MR. FILES: No, we agree with the Court as far as –

[58] THE COURT: So your complaint or your position is that because she did not know all of the people that were trading it, and specifically Mr. Paroline, then she has, therefore, not suffered any harm as a result of his conduct?

MR. FILES: Yes, Your Honor. I may be taking a simplistic approach to this, but the statute in Hughey appeared to require offense of conviction and showing of harm. I can't find anything on strict liability, and I cannot conceive of a restitution order in this case on anything other than a strict liability basis.

Congress had the opportunity to legislate in that area, and they have chosen not to. If this Court

chooses to find that Mr. Paroline is liable because of his possession of these photographs and nothing more, then I can't imagine what the basis is other than strict liability. It can't possibly come under 2259. It is not there.

THE COURT: Okay. Thank you. You may proceed.

MR. FILES: Okay. Now, the conundrum that I have is that Mr. Marsh concedes that you have to have causation. The Government in its brief concedes causation. The stipulation which we have all signed; Mr. Baldwin, Mr. Marsh, and I, have taken causation off the table. It is not there.

THE COURT: Well, I think their argument is that the causation is there in fact by his possession, as opposed to proximate causation. Would you care to comment on that?

[59] MR. FILES: Well, Mr. Baldwin's argument about he burglarizes and he gives it to me; and in Texas I am a party and I get charged with exactly the same thing and it is offense of conviction and I get prosecuted and I have to make restitution. It is a stepping into the room. It is not provided for by statute. I am not sure I am answering the Court's question. If I am not, if the Court will tell me.

THE COURT: I am struggling with it myself. I am just looking for some clarification. Mr. Marsh or Mr. Baldwin –

MR. FILES: Would you –

THE COURT: Just a moment.

Would you care to weigh in at this point?

MR. BALDWIN: Your Honor –

THE COURT: – or have we exhausted this?

MR. BALDWIN: Perhaps, Mr. Marsh would have some comments. I believe that we have addressed this pretty well. It is a difficult thing to understand.

THE COURT: I think we are getting back into the causation issue pretty deeply rather than the actual damages.

But, Mr. Marsh, do you have anything you wish –

MR. MARSH: No, Your Honor, not to the causation issue. We have been over it, and I don't think there is anything to add in that regard. All of the parties have sufficiently addressed the issues for the Court.

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672 F.Supp.2d 781

UNITED STATES of America

v.

Doyle Randall PAROLINE.

No. 6:08-CR-61.

United States District Court,
E.D. Texas, Tyler Division.

December 7, 2009

F.R. Buck Files, Jr., Bain Files Jarrett & Bain PC, Tyler, TX, for Defendant.

James R. Marsh, The Marsh Law Firm PLLC, White Plains, NY, for Movant.

Paul Cassell, National Crime Victims Law Institute, Salt Lake City, UT, for Amicus, National Crime Victim Law Institute, Victim Rights Center.

Yiota G. Souras, The National Center for Missing and Exploited Children, Alexandria, VA, for Amicus, The National Center for Missing, and Exploited Children.

William D. Baldwin, U.S. Attorney's Office, Tyler, TX, for Plaintiff.

MEMORANDUM OPINION AND ORDER

LEONARD DAVIS, District Judge.

Before the Court is a Request for Restitution by Amy,[1] who is a victim in the "Misty" child pornography series.[2] Defendant Doyle Randall Paroline ("Paroline") unlawfully possessed two pornographic images of Amy he obtained over the Internet. Having considered the parties' oral arguments and written submissions, and for the reasons explained below, the Government has not met its burden of proving what losses, if any, were proximately caused by Paroline's possession of Amy's two pornographic images and thus, the Request for Restitution is **DENIED**.

BACKGROUND

On January 9, 2009, Paroline pled guilty to one count of possession of material involving the sexual exploitation of children in violation of 18 U.S.C. §§ 2252(a)(4)(B) and 2252(b)(2). Paroline admitted to knowingly possessing on his computers between 150 and 300 images of minors engaged in sexually explicit conduct (Docket No. 6). The National Center for Missing and Exploited Children ("NCMEC") identified

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[1] "Amy" is a pseudonym used to protect the privacy of the victim in the "Misty" child pornography series.

[2] A series is a collection of images and/or video files taken over a period of time, typically containing both pornographic and non-pornographic images of a child or children. NCMEC's Brief, Docket No. 30, at 5.

Amy as at least one of the minors depicted in the pornographic images. Amy is depicted in two of the pornographic images Paroline possessed.[3]

On June 10, 2009, Paroline was sentenced to 24 months custody in the Bureau of Prisons and 120 months of supervised release. During sentencing, the Court reviewed Amy's Victim Impact Statement and her Request for Restitution under 18 U.S.C. § 2259.[4] Her Victim Impact Statement detailed not only the harm she has suffered from the abuse by her uncle when she was eight and nine years of age, but the harm she continues to endure ten years later by knowing that pornographic images of her are circulating against her will on the Internet and there is nothing she can do to stop it. In her Request for Restitution, Amy seeks approximately $3,367,854 from Paroline. This amount reflects the total amount of Amy's losses and includes costs for future psychological care, future lost income, and attorney's fees. Amy's Latest Request for Restitution, Docket No. 54-2, at 18. Amy offers no alternate theory of restitution

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[3] Amy was sexually exploited by her uncle when she was eight and nine years of age. She is now 19 years of age. The pornographic images of her abuse depict rape, cunnilingus, fellatio, and digital penetration. These images have been, and continue to be, traded and distributed on the Internet. Amy's Latest Request for Restitution, Docket No. 54-2, at 3.

[4] This is only one of approximately 250 restitution requests Amy has filed against different defendants across the country who have been charged with possession of child pornography involving the "Misty" series.

for the portion of her total losses proximately caused by any single defendant's possession of her images. Amy's restitution request is being made by the Government on her behalf. Amy's personal attorney, Mr. James R. Marsh, has also participated in presenting Amy's restitution request in this case.

Because the issue of restitution in child pornography possession cases is one of first impression in this Court, the Court severed the restitution issue from the sentencing proceeding and ordered all interested parties to submit briefing on the issue (Docket No. 13). The Court received briefing from the Government, Amy, Paroline, and other interested parties including NCMEC. On August 20, 2009, the Court conducted a hearing pursuant to 18 U.S.C. § 3664(d)(5) to determine restitution. At the hearing, Paroline requested additional time to obtain the data underlying Amy's restitution request and further brief the restitution issue. In addition, Paroline and his counsel waived the statutory requirement that a final determination concerning restitution be held within 90 days of sentencing (Docket No. 36). Following the August 20 hearing, Paroline filed a motion for certain discovery materials, which the Court granted in part and denied in part (Docket No. 46).[5] The Court

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[5] In his discovery motion, Paroline requested the data underlying Amy's experts' reports and requested that he be allowed to depose Amy's experts. The Court granted these requests. The Court also granted Paroline's request for an accounting of all cases in which Amy had filed a similar restitution request and the amount of restitution ordered and collected in each case.

(Continued on following page)

received supplemental briefing from Paroline, the Government, and Amy, and held a second restitution hearing on October 28, 2009 where Paroline presented additional evidence and arguments against Amy's restitution request.

APPLICABLE LAW

The victim in this case seeks restitution under 18 U.S.C. § 2259,[6] which governs restitution for all

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Paroline further requested that Amy be produced for a forensic psychological or psychiatric examination. The Court denied this request. Paroline also requested expert funds to assist him in rebutting the data underlying Amy's Request for Restitution. The Court denied this request without prejudice to re-urging at a later date.

[6] Section 2259 provides:

(a) In general. – Notwithstanding section 3663 or 3663A, and in addition to any other civil or criminal penalty authorized by law, the court shall order restitution for any offense under this chapter.

(b) Scope and nature of order. –

(1) Directions. -- The order of restitution under this section shall direct the defendant to pay the victim (through the appropriate court mechanism) the full amount of the victim's losses as determined by the court pursuant to paragraph (2).

(2) Enforcement. – An order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A.

(3) Definition. – For purposes of this subsection, the term "full amount of the victim's losses" includes any costs incurred by the victim for –

(Continued on following page)

offenses involving the sexual exploitation and other abuse of children. 18 U.S.C. § 2259(a). Section 2259 clearly mandates that the sentencing court order a defendant convicted of such an offense to pay restitution

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(A) medical services relating to physical, psychiatric, or psychological care;

(B) physical and occupational therapy or rehabilitation;

(C) necessary transportation, temporary housing, and child care expenses;

(D) lost income;

(E) attorneys' fees, as well as other costs incurred; and

(F) any other losses suffered by the victim as a proximate result of the offense.

(4) Order mandatory. –

(A) The issuance of a restitution order under this section is mandatory.

(B) A court may not decline to issue an order under this section because of –

(i) the economic circumstances of the defendant; or

(ii) the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source.

(c) Definition. – For purposes of this section, the term "victim" means the individual harmed as a result of a commission of a crime under this chapter, including, in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, but in no event shall the defendant be named as such representative or guardian.

to the victim of the crime. 18 U.S.C. § 2259(b)(4)(A). The statute provides that restitution is available for "the full amount of the victim's losses." 18 U.S.C. § 2259(b)(1). Compensable losses under section 2259 include, among other things, any costs incurred by the victim for "medical services relating to physical, psychiatric, or psychological care," "physical and occupational therapy or rehabilitation," and "attorneys' fees, as well as other costs incurred." 18 U.S.C. § 2259(b)(3). Further, section 2259 specifically prohibits the Court from declining to order restitution because of the defendant's economic circumstances or because the victim receives compensation for his or her injuries from another source. 18 U.S.C. § 2259(b)(4)(B). The Government must prove the amount of the victim's losses by a "preponderance of the evidence," and that Court shall resolve any dispute as to the proper amount of restitution by the same standard. 18 U.S.C. § 3664(e).

ANALYSIS

Victim Status Under § 2259

The Court's first task is to determine whether Amy is a "victim" of Paroline's offense. Section 2259 defines a "victim" as any "individual harmed as a result of a commission of a crime under [the Sexual Exploitation and Other Abuse of Children Chapter of Title 18]." 18 U.S.C. § 2259(c). It is undisputed that Paroline was convicted of a crime under this chapter and that Amy was depicted in two of the pornographic

images Paroline possessed. Thus, Amy is a victim for purposes of section 2259 if she was harmed as a result of Paroline's possession of her images.

Child pornography fosters the exploitation of innocent and vulnerable children all over the world. It causes irreparable harm to some of the weakest members of our society. Child pornography is a permanent photographic record of the victim's sexual abuse, and the distribution and circulation of the pornographic images forever exacerbates the harm to these child victims. *New York v. Ferber*, 458 U.S. 747, 759, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982) (finding that "[t]he distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children"). In the Supreme Court's landmark decision in *New York v. Ferber*, the Court extensively discussed the issue of child pornography and the long-term physiological, emotional, and mental harms associated with the sexual exploitation of children. 458 U.S. at 758, 102 S.Ct. 3348. The Court cited to various authorities in the field of child exploitation, noting that:

> The use of children as . . . subjects of pornographic materials is very harmful to both the children and the society as a whole. It has been found that sexually exploited children are unable to develop healthy affectionate relationships in later life, have sexual dysfunctions, and have a tendency to become sexual abusers as adults.
>
> . . . .

> Pornography poses an even greater threat to the child victim than does sexual abuse or prostitution. Because the child's actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place. A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography.

Id. at 758-60, nn. 9 & 10, 102 S.Ct. 3348 (internal quotations and citations omitted).

The Fifth Circuit has also addressed the issue of child pornography. In *United States. v. Norris*, the Fifth Circuit held that "children depicted in child pornography may be considered to be the victims of the crime of receiving child pornography." 159 F.3d 926, 929 (5th Cir.1998). The court determined that "the 'victimization' of the children involved does not end when the photographer's camera is put away." *Id.* The end-user or possessor of pornographic materials may be considered to be causing the children depicted in those materials to suffer as a result of his actions in at least three ways: (1) because the dissemination of the images perpetuates the abuse initiated by the producer of the materials, a consumer who merely receives or possesses child pornography directly contributes to the child's continued victimization; (2) because the mere existence of the child pornography invades the privacy of the child depicted, the recipient of the child pornography directly victimizes the child by perpetuating the invasion of the child's

privacy; and (3) because the consumer of child pornography instigates, enables, and supports the production of child pornography, the consumer continuously and directly abuses and victimizes the child subject. *Id.* at 929-30. Thus, "the victimization of a child depicted in pornographic materials flows just as directly from the crime of knowingly receiving child pornography as it does from the arguably more culpable offenses of producing or distributing child pornography." *Id.* at 930.

Congress has also long recognized the harm inflicted on victims of child pornography. In the legislative history of the Child Pornography Prevention Act of 1996, Congress specifically cited and broadly quoted from the landmark *New York v. Ferber* decision finding that "[t]he use of children as subjects of pornographic materials is harmful to the physiological, emotional and mental health of a child." S.Rep. No. 104-358, at 14 (1996) (citing *New York v. Ferber*, 458 U.S. 747, 759, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982)). Congress further observed that "it has been found that sexually exploited children are unable to develop healthy affectionate relationships in later life, have sexual dysfunctions, and have a tendency to become sexual abusers as adults." *Id.* More recently, Congress again addressed the impact of child pornography in the legislative history behind the Adam Walsh Child Protection and Safety Act of 2006, Pub.L. No. 109-248, § 501, 120 Stat. 587, 623 (2006). Congress found that "[t]he illegal production, transportation, distribution, receipt, advertising[,] and possession

of child pornography . . . is harmful to the physiological, emotional, and mental health of the children depicted in child pornography and has a substantial and detrimental effect on society as a whole." *Id.* Congress further observed that "[e]very instance of viewing images of child pornography represents a renewed violation of the privacy of the victims and repetition of their abuse." *Id.* at 624.

In addition to the courts' and Congress's recognition of the long-term harms associated with child pornography, NCMEC data indicates that incidents of online child pornography are increasing. *See* NCMEC's Brief, Docket No. 30. NCMEC was established in 1984 as a private, nonprofit organization to assist families, law enforcement, and other professionals in preventing the abduction, endangerment, and sexual exploitation of children. *Id.* at 2. NCMEC works with both federal and state governments and law enforcement agencies to prevent and combat the growing problem of child sexual exploitation. *Id.* Using two central programs, the CyberTipline and the Child Victim Identification Program ("CVIP"), NCMEC serves as the central repository for information relating to child pornography cases across the country. *Id.* at 2-5. In 2000, NCMEC sponsored a study that profiled arrested offenders who possessed child pornography and surveyed participating state and local law enforcement agencies. *See* Janis Wolak, et al., *Child Pornography Possessors Arrested in Internet Related Crimes: Findings from the National Online Juvenile Victimization Study* (2005). The

study revealed that the dissemination of child pornography may increase the trauma experienced by the victims because the victims know "their pictures are circulating globally on the Internet with no hope of permanent removal." *Id.* at 27.

In addition to NCMEC's study, various other studies document the harm caused to a child by the possession and distribution of child pornography. One study demonstrates that a child's psychological harm after the actual sexual exploitation continues into adulthood and affects his ability to develop healthy relationships. John E.B. Myers, et al., *The APSAC Handbook on Child Maltreatment* 55-69 (2d ed. 2002). The child victims develop a number of psychological disorders, including depression, withdrawal, and anger, and experience feelings of guilt, betrayal, powerlessness, worthlessness, and low self-esteem. *Id.* Another study suggests that the continual online distribution and possession of the child pornography images re-victimizes these child victims, stripping them of any control over the disclosure of their abuse and exposing them to further shame and humiliation. *See* Ethell Quayle, et al., *Child Pornography and Sexual Exploitation of Children Online* 59-60 (2008).

Based on the Supreme Court's analysis in *Ferber*, the Fifth Circuit's reasoning in *Norris*, and the overwhelming amount of literature and briefing regarding the harm caused to children depicted in child pornography, the Court finds that the Government has met its burden of establishing that Amy was "harmed as a result of" Paroline's possession of pornographic

images depicting Amy's sexual abuse. Accordingly, Amy is a victim of Paroline's offense for purposes of section 2259. The Court now turns to the issue of causation between Paroline's conduct and his victim's alleged losses.

Causation Under § 2259

Amy contends that, as a matter of statutory construction, there is simply no proximate cause requirement for the losses specifically enumerated in the statute.[7] On the other hand, both the Government and Paroline are of the view that section 2259 requires a showing of proximate cause between the victim's losses and the defendant's conduct. The Government, however, argues that it has met its burden of proving by a preponderance of the evidence that the total amount of Amy's losses ($3,367,854) were indeed proximately caused by Paroline's conduct. Thus, the Court must determine first whether there is a proximate cause requirement in section 2259, and if so, whether the Government has met its burden of proving that the total amount of Amy's losses were

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[7] Thus, Amy seeks restitution for the full amount ($3,367,854) of her losses stemming from the abuse itself and the dissemination of her pornographic images. Amy's theory of restitution is not limited to those losses proximately caused by any single defendant's possession of her images. She embraces the view that every defendant is jointly and severally liable for the total amount of her losses, although she points out that she is not seeking any windfall beyond her total losses, i.e. no double recovery.

proximately caused by Paroline's possession of Amy's two pornographic images.

Is There a Proximate Cause Requirement?

Section 2259 provides that restitution is available for "the full amount of the victim's losses." 18 U.S.C. § 2259(b)(1). The statute specifies that these losses include, among other things, any costs incurred by the victim for "medical services relating to physical, psychiatric, or psychological care," "physical and occupational therapy or rehabilitation," and "attorneys' fees, as well as other costs incurred." 18 U.S.C. § 2259(b)(3). The statute provides six categories of losses, but only the last subsection, which provides for "any other losses suffered by the victim" expressly contains a "proximate result" requirement. 18 U.S.C. § 2259(b)(3)(F).

Amy contends that proximate cause is simply not a factor in a restitution determination under section 2259. Specifically, Amy argues that, as a matter of statutory construction, the "proximate result" language in the statute modifies only the "catchall" category of losses, not the other loss categories enumerated in section 2259, and the other categories of loss are mandatory without regard to causation. However, the Supreme Court has held that "[w]hen several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to

all." *Porto Rico Ry., Light & Power Co. v. Mor.*, 253 U.S. 345, 348, 40 S.Ct. 516, 64 L.Ed. 944 (1920); *see also Fed. Mar. Comm'n v. Seatrain Line, Inc.*, 411 U.S. 726, 734, 93 S.Ct. 1773, 36 L.Ed.2d 620 (1973) (holding that a "catchall provision" was "to be read as bringing within a statute categories similar in type to those specifically enumerated"). Based on this rule of construction, the phrase "as a proximate result of the offense" would apply equally to all the loss categories in section 2259(b)(3). This construction has been applied in a very well reasoned opinion of the District Court of Maine, holding that "the natural construction of [section 2259] demands that the proximate cause requirement be read as applicable to every class of loss set forth in the statute." *United States v. Berk*, 666 F.Supp.2d 182, 188 (D.Me.2009).[8]

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[8] In further support of her argument against reading a proximate cause requirement into the statute, Amy argues that other federal restitution statutes require either "proximate harm" or "direct harm" in the definition of "victim" while section 2259 requires a more generalized "harm." Amy's Latest Request for Restitution, Docket No. 54-2, at 25. Amy suggests that by omitting the terms "directly" or "proximately" in section 2259's definition of "victim," "Congress . . . explicitly recognized the causal link between the criminal conduct . . . and the harm experienced by the victims." *Id.* However, this argument is unpersuasive because the Court has already concluded that Amy has been harmed by Paroline's conduct. The relevant inquiry at this stage of the analysis is not whether Amy has been harmed by Paroline's conduct, but whether the statute requires that the Government prove the amount of Amy's losses proximately caused by Paroline's conduct.

Furthermore, construing the statute as Amy suggests could render section 2259 unconstitutional. Paroline argues that a restitution award not tied to those losses proximately caused by his conduct would "clearly be excessive" in violation of the Eighth Amendment.[9] Defendant's Opening Brief, Docket No. 26, at 15. "[A]n Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available." *Rust v. Sullivan*, 500 U.S. 173, 190, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991); *see also United States v. Valencia*, 394 F.3d 352, 355 (5th Cir.2004) ("In [construing a statute], we give effect to the intent of Congress, and as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act.") (internal citation omitted). This Court is of the opinion that a restitution order under section 2259 that is not limited to losses proximately caused

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[9] The Eighth Amendment provides: "Excessive bail shall not be required, no excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST., amend. VIII. Paroline cites to *United States v. Bajakajian*, where the Supreme Court held a criminal forfeiture invalid under the Eighth Amendment reasoning "[i]f the amount of the forfeiture is grossly disproportional to the gravity of the defendant's offense, it is unconstitutional." 524 U.S. 321, 337, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998). The Third and Ninth Circuits have reviewed restitution issues under the same Eight Amendment analysis. *See United States v. Dubose*, 146 F.3d 1141, 1144-45 (9th Cir.1998); *United States v. Lessner*, 498 F.3d 185, 205 (3d Cir.2007).

by the defendant's conduct would under most facts, including these, violate the Eighth Amendment.

The Government agrees that section 2259 does have a causation requirement. "A victim is only entitled to recover restitution for losses that are proximately caused by the conduct in question" because "[i]t would be nonsensical for the statute to include differing burdens of proof and different causal requirements for different types of losses." Government's Opening Brief, Docket No. 29, at 3 & n. 13. However, the Government argues that it has met its burden of proving that Amy's total losses were proximately caused by Paroline's conduct. Paroline disagrees with both Amy and the Government.

Paroline contends that section 2259 requires that the Government prove by a preponderance of the evidence the amount of Amy's specific losses proximately caused by Paroline's possession of her two images. Paroline urges the Court to apply general restitution and causation principles in its analysis of section 2259. Defendant's Opening Brief, Docket No. 26, at 4-5. Indeed, restitution ordered in criminal cases is generally tied to the losses caused by the specific offense of conviction. *See Hughey v. United States*, 495 U.S. 411, 412-13, 110 S.Ct. 1979, 109 L.Ed.2d 408 (1990); *United States v. Maturin*, 488 F.3d 657, 660-61 (5th Cir.2007); *United States v. Wright*, 496 F.3d 371, 381 (5th Cir.2007).

For example, in *Hughey v. United States*, the Supreme Court held that the Victim and Witness

Protection Act of 1982 ("VWPA") authorized restitution "only for the loss caused by the specific conduct that is the basis of the offense of conviction." 495 U.S. at 412-13, 110 S.Ct. 1979. The Fifth Circuit has applied *Hughey* noting that a "district court can award restitution to victims of the offense, but the restitution award can encompass only those losses that resulted directly from the offense for which the defendant was convicted." *Maturin*, 488 F.3d at 660-61, 661 n. 2 (noting that *Hughey*, 495 U.S. at 413, 110 S.Ct. 1979, also applies to cases arising under the Mandatory Victims Restitution Act of 1996 ("MVRA") and, although *Hughey* predated the enactment of the MVPA, the "[C]ourt's holding that restitution must be limited to losses caused by the offense of conviction remains good law"); *see also United States v. Arledge*, 553 F.3d 881, 898 (5th Cir.2008). Furthermore, "[w]hen a defendant is ordered to pay restitution in an amount greater than the loss caused, the error affects substantial rights as well as the fairness and integrity of the judicial proceeding." *United States v. Austin*, 479 F.3d 363, 373 (5th Cir.2007). The Fifth Circuit has referred to the causation requirement as the "*Hughey* limitation." *See United States v. Ortiz*, 252 Fed.Appx. 664, 666 (5th Cir.2007).

However, the Fifth Circuit has also held that, although "[a] defendant sentenced under the [MVRA] is only responsible for paying restitution for the conduct underlying the offense for which he was convicted," "where a fraudulent scheme is an element of the conviction, the court may award restitution for

actions pursuant to that scheme." *United States v. Inman*, 411 F.3d 591, 595 (5th Cir.2005) (internal citation omitted). Amy argues that "[t]he illicit trade in child pornography is a joint enterprise" and "[e]ach possession and each distribution of each image all combine to . . . a 'single indivisible result.'" Amy's Latest Request for Restitution, Docket No. 54-2, at 14. *See United States. v. Norris*, 159 F.3d 926, 929-30 (5th Cir.1998). However, the offense of conviction in this case – possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B) and 2252(b)(2) – does not have a fraudulent scheme or conspiracy as an element of the offense. If the Court were to adopt Amy's reading of section 2259 and find that there is no proximate cause requirement in the statute, a restitution order could hold an individual liable for a greater amount of losses than those caused by his particular offense of conviction. This interpretation would be plainly inconsistent with how the principles of restitution and causation have historically been applied.

Although the Fifth Circuit has yet to construe section 2259, other circuits that have considered restitution awards under section 2259 have interpreted the statute to require a causal connection between the victim's losses and the offense of conviction. *United States v. Crandon*, 173 F.3d 122, 125 (3d Cir.1999) ("[Section 2259] requires awarding the full amount of the victim's losses suffered as a proximate result of the offense."); *United States v. Laney*, 189 F.3d 954, 965 (9th Cir.1999) ("Section 2259 . . .

incorporates a requirement of proximate causation . . . requir[ing] a causal connection between the offense of conviction and the victim's harm."); *United States v. Searle*, 65 Fed.Appx. 343, 346 (2d Cir.2009) (assuming that section 2259 includes a requirement that the victim's losses be suffered by the victim as a proximate result of the offense). However, the Court is not aware of any circuit court that has considered a restitution award under section 2259 where the defendant was an end-user or possessor of child pornography. Restitution in possession cases is an issue of first impression in district courts around the nation as the Government has only recently begun seeking restitution from possessors of child pornography on behalf of victims.

Restitution orders entered in possession cases have varied among the various district courts addressing the issue. On July 9, 2009, a district court in the Northern District of Florida entered a restitution order against a possessor criminal defendant in favor of Amy in the amount of $3,263,758. *United States v. Freeman*, No. 3:08-cr-22 (N.D.Fla. filed July 9, 2009). Similarly, a district court in the Southern District of Florida ordered a possessor criminal defendant to pay $3,680,153 in restitution to Amy without addressing the proximate causation issue. *United States v. Staples*, No. 09-14017-CR, 2009 WL 2827204, at *3-4 (S.D.Fla. Sept. 2, 2009). On the other hand, a district court in the Northern District of California declined to order restitution because restitution was precluded under the defendant's plea agreement, but noted that

"a restitution order in [an end-user possession] case must be based upon the identification of a specific injury to the victim that was caused by the specific conduct of the defendant." *United States v. Simon*, 2009 WL 2424673, at *7 (N.D.Cal. August 7, 2009). The Central and Eastern Districts of California have taken a different approach, seemingly adopting a set amount of restitution per defendant convicted of possession of child pornography. *See United States v. Brown*, No. 2:08-cr-1435 (C.D.Cal. filed Oct. 5, 2009) (awarding restitution in the amount of $5,000 to each victim); *United States v. Ferenci*, No. 1:08-cr-0414, 2009 WL 2579102, at *6 (E.D.Cal. Aug. 19, 2009) (awarding restitution in the amount of $3,000 to the victim). In another case, the Government and the defendant stipulated to the amount of restitution because it was "in the best interest of justice, judicial expedience[,] and economy in resolving this novel legal issue." *United States v. Granato*, No. 2:08-cr-198 (D. Nev. filed August 28, 2009). Most recently, a district court in Maine declined to order restitution finding that the Government "failed to present sufficient evidence showing a particular loss proximately caused by the offense of conviction." *United States v. Berk*, 666 F.Supp.2d 182, 193 (D.Me.2009).

After considering all of the arguments, authority before it, and principles of statutory construction, the Court finds that section 2259 requires that a victim's losses be proximately caused by the defendant's conduct to be recoverable in restitution. General restitution and causation principles applied by the Supreme

Court and the Fifth Circuit support this interpretation of the statute. Moreover, this interpretation is consistent with the various circuit courts that have interpreted section 2259 to require that the victim's losses be proximately caused by the defendant's conduct. Thus, an award of restitution under section 2259 is appropriate only for the amount of the victim's losses proximately caused by the defendant's conduct.

Were Amy's Total Losses Proximately Caused By Paroline's Possession?[10]

The Government argues that the proximate cause requirement is satisfied because Amy was obviously "harmed" by Paroline's conduct. However, the Government is conflating the proximate cause requirement with the requirement that the victim be harmed as a result of Paroline's conduct. Certainly, Amy was harmed by Paroline's possession of Amy's two pornographic images, but this does little to show

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[10] This type of "possession case" differs from a "production case," where the defendant is the actual abuser and producer of the child pornography. In a "production case" there is no question of causation because all of the victim's losses are proximately caused by the defendant. *See United States v. Baker*, 666 F.Supp.2d 182 (E.D.Tex.2009) ("[R]estitution in [a 'production case'] is payment for the harm caused to the victim by the production and dissemination of the child pornography. . . . The entirety of losses these images cause these children, now and in the future, is a direct and proximate result of the crimes to which [the defendant] pled guilty.")

how much of her harm, or what amount of her losses, was proximately caused by Paroline's offense. A victim is not necessarily entitled to restitution for all of her losses simply because the victim was harmed and sustained some lesser loss as a result of a defendant's specific conduct. The proper inquiry is whether the Government has met its burden of proving by a preponderance of the evidence the amount of Amy's losses proximately caused by Paroline's conduct.

Proximate cause is defined as "[a] cause that directly produces an event and without which the event would not have occurred." BLACK'S LAW DICTIONARY 234 (8th ed. 2004). Thus, the Government has the burden of proving the amount of Amy's losses directly produced by Paroline that would not have occurred without his possession of her images. The Court is guided by certain principals in making this determination. "The determination of an appropriate restitution amount is by nature an inexact science," *United States v. Teehee*, 893 F.2d 271, 274 (10th Cir.1990), and "[a] sentencing court may resolve restitution uncertainties 'with a view towards achieving fairness to the victim,' so long as it still makes a 'reasonable determination of appropriate restitution' rooted in a calculation of actual loss." *United States v. Fallah*, No. H-07-155, 2008 WL 5102281, at *2 (S.D.Tex. December 1, 2008) (quoting *United States v. Vaknin*, 112 F.3d 579, 587 (1st Cir.1997) (internal quotation omitted)). Notwithstanding some latitude in making this determination, the Court must be guided by the premise that "[a]n order of restitution

must be limited to losses caused by the specific conduct underlying the offense of conviction." *United States v. Tencer*, 107 F.3d 1120, 1135 (5th Cir.1997).

The Court has held two hearings regarding the issue of restitution in this case and has reviewed the parties' initial and supplemental briefs. To substantiate her claim for approximately $3,367,854 in restitution, Amy has submitted: (1) a Victim Impact Statement; (2) a psychological evaluation by Dr. Joyanna Silberg dated November 21, 2008; (3) an economic report by Dr. Stan V. Smith dated September 15, 2008; and (4) numerous excerpts from articles discussing the harms associated with child pornography. The losses described in Amy's reports are generalized and caused by her initial abuse as well as the general existence and dissemination of her pornographic images. No effort has been made to show the portion of these losses specifically caused by Paroline's possession of Amy's two images. After reviewing the data underlying Amy's experts' reports, Paroline submitted a supplemental brief that identifies certain discrepancies between Amy's Victim Impact Statement and Dr. Silberg's notes. Paroline's supplemental briefing also includes a report by Dr. Timothy J. Proctor enumerating his concerns as to the reliability of Dr. Silberg's report and an economic report prepared by Dr. Kent Gilbreath that sets forth estimates of Amy's future potential earning capacity

to illustrate the discrepancy between his sums and those of Dr. Smith.[11]

It is clear from the evidence before the Court that a large portion of Amy's total losses were caused by her original abuse by her uncle. It is equally clear that significant losses are attributed to the widespread dissemination and availability of her images and the possession of those images by many individuals such as Paroline. There is no doubt that everyone involved with child pornography – from the abusers and producers to the end-users and possessors – contribute to Amy's ongoing harm. The Court is sympathetic to Amy and the harm that she has undoubtedly experienced and will continue to experience for the rest of her life. The Court also realizes that it is incredibly difficult to establish the amount of a victim's losses proximately caused by any one defendant convicted of possession. However, the Court's sympathy does not dispense with the requirement that the Government satisfy its burden of proving

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[11] In addition, the Government, Amy, and Paroline entered into a Stipulation establishing that Amy does not know who Paroline is and none of the losses for which she seeks restitution flow from her knowledge about Paroline or his conduct (Docket No. 47). Paroline argues that this "effectively precludes a finding by the Court that any of Amy's injuries or damages were the proximate result of [his] conduct." Defendant's Supplemental Brief, Docket No. 48, at 15. However, section 2259 does not require that Amy have knowledge of each individual possessor and his conduct in order to establish proximate cause, it simply requires that restitution be tied to the victim's losses proximately caused by a defendant's possession of Amy's images.

the amount of Amy's losses proximately caused by Paroline's possession of her two images. Although this may seem like an impossible burden for the Government, the Court is nevertheless bound by the requirements of the statute.[12]

Having reviewed all of the evidence, the Court finds that the Government has failed to meet its burden of proving any specific losses proximately caused by Paroline's conduct. Thus, an award of restitution is not appropriate in this case. *See Berk*, 2009 WL 3451085, at *5. *But cf. United States v. Baker*, 666 F.Supp.2d 182 (E.D.Tex.2009) (awarding $150,000 in restitution to each minor victim).[13]

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[12] While Congress was obviously well intended in attempting to create a statutory framework to help compensate victims of child pornography, it has unfortunately created one that is largely unworkable in the context of criminal restitution. 18 U.S.C. § 2255, however, does provide a civil remedy for those victims able to obtain counsel to pursue it. There is a great need for counseling and medical care for victims of child pornography. Perhaps a statutory provision requiring that fines for child pornography be paid to a national center that would act as a trustee to disburse funds for counseling of victims of child pornography would do more to help these victims than the seemingly unworkable criminal restitution provisions in 18 U.S.C. § 2259.

[13] In *Baker*, the Court relied on Congress's mandated minimum damage amount of $150,000 set forth in 18 U.S.C. § 2255(a) to award the minor victims $150,000 each in restitution. The Court found the victims' expert's estimate of losses inadequate to cover the full amount of the victims' losses, reasoning that any award of restitution below the statutorily mandated minimum of $150,000 would fall short of making the minor victims whole. This case differs from *Baker* in two respects.

(Continued on following page)

CONCLUSION

Accordingly, the Court finds that Amy was harmed as a result of Paroline's conduct and thus, is a "victim" for purposes of section 2259. However, a restitution award under section 2259 requires that the Government prove by a preponderance of the evidence the amount of the victim's losses proximately caused by the defendant's conduct. Having considered the parties' oral arguments and written submissions, the Government has not met its burden of proving what losses, if any, were proximately caused by Paroline's possession of Amy's two pornographic images and thus, the Request for Restitution is **DENIED**.

First, the defendant in *Baker* was the actual producer and distributor of the child pornography and thus, causation was not an issue. Therefore, the Court's only task in *Baker* was to determine the proper amount of restitution. In contrast, as a case of first impression, this "possession case" required an exhaustive causation analysis to determine whether an award of restitution was even appropriate. Because the Court has concluded that the Government did not establish any specific losses proximately caused by Paroline's possession of Amy's images, the amount of restitution in this case was not subject to calculation. Second, unlike *Baker*, where the Court was confident $150,000 was far below the minor victims' actual losses, the Court is concerned that a restitution award of $150,000 in this case may exceed any specific losses proximately caused by Paroline's possession of Amy's images. *See United States v. Austin*, 479 F.3d 363, 373 (5th Cir.2007) (holding that when a restitution award is greater than the losses caused by the defendant's conduct, the error affects the defendant's substantial rights and the fairness and integrity of the judicial proceeding).

591 F.3d 792

In re: AMY, the Victim in the Misty Child Pornography Series, Petitioner.

No. 09-41238.

United States Court of Appeals, Fifth Circuit.

December 21, 2009

As Revised Dec. 22, 2009.

James R. Marsh, Marsh Law Firm, White Plains, NY, for Amy.

Fred Rimes Files, Jr., Bain, Files, Jarrett, Bain & Harrison, Tyler, TX, for Paroline.

William D. Baldwin, Amanda Louise Griffith, Traci Lynne Kenner, Asst. U.S. Attys., Tyler, TX, for U.S.

Petition for Writ of Mandamus to the United States District Court for the Eastern District of Texas.

Before DAVIS, SMITH and DENNIS, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

Petitioner, proceeding under the pseudonym "Amy," seeks a writ of mandamus directing the district court to enter an order requiring defendant Doyle Randall Paroline ("Paroline") to pay victim restitution to her in the amount of $3,367,854. Alternatively, petitioner asks us to remand this case to the district court for reconsideration of its order declining to impose

restitution against Paroline. Because the district court's conclusion[1] that the government failed to establish that any of the defendant's conduct related to this offense proximately caused Amy's damages is not indisputably wrong, we DENY the writ of mandamus.

The standard of review is the usual standard for mandamus petitions, as set forth in *In re Dean*, 527 F.3d 391 (5th Cir.2008). "A writ of mandamus may issue only if (1) the petitioner has 'no other adequate means' to attain the desired relief; (2) the petitioner has demonstrated a right to the issuance of a writ that is 'clear and indisputable;' and (3) the issuing court, in the exercise of its discretion, is satisfied that the writ is 'appropriate under the circumstances.'" *Id.* at 394 (quoting *In Re United States*, 397 F.3d 274, 282 (5th Cir.2005)).

In this case, the first requirement is fulfilled because the petitioner likely has no other means for obtaining review of the district court's decision not to order restitution. *See United States v. Hunter*, 548 F.3d 1308, 1311-16 (10th Cir.2008) (holding that a victim may not bring an appeal from a final judgment in a criminal case asserting that her rights under § 3771 were violated). However, we are not persuaded that the second requirement is met.

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[1] *See* 2009 WL 4572786.

Approximately a decade ago, when petitioner was 8 or 9 years old, her uncle took a series of photographs depicting her in sexually abusive poses. Her uncle distributed the sexually abusive images to third parties and, over the ensuing decade, those images were distributed widely via the internet and other electronic means. Defendant Doyle Randall Paroline ("Paroline") pleaded guilty to a single count of possessing material involving the sexual exploitation of children in violation 18 U.S.C. §§ 2252(a)(4)(B) & 2252(b)(2), stemming from the large number of images of children engaged in sexually explicit conduct that were found on Paroline's computer. Two of the sexually abusive images were those made of Petitioner when she was 8 or 9 years old.

The Government moved in the district court on petitioner's behalf, and petitioner moved through her own counsel, for restitution pursuant to 18 U.S.C. § 2259. The statute provides that the district court "shall order restitution for any offense under this chapter," which includes the offenses for which Paroline was convicted. 18 U.S.C. § 2259(a). "The order of restitution under this chapter shall direct the defendant to pay the victim . . . the full amount of the victim's losses as determined by the court." *Id.* § 2259(b)(1). A "victim" for purposes of the statute "means the individual harmed as a result of a commission of a crime under this chapter." *Id.* § 2259(c). "The full amount of the victim's losses," for purposes of the statute, "includes any costs incurred by the victim for –

> (A) medical services relating to physical, psychiatric, or psychological care;
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> (B) physical and occupational therapy or rehabilitation;
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> (C) necessary transportation, temporary housing, and child care expenses;
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> (D) lost income;
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> (E) attorneys' fees, as well as other costs incurred; and
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> (F) any other losses suffered by the victim as a proximate result of the offense."

Id. § 2259(b)(3).

Section 2259(b)(3) therefore arguably requires the government to establish that recoverable damages must proximately result from the "offense".

We agree with the district court that

> [I]f the Court were to adopt Amy's reading of section 2259 and find that there is no proximate cause requirement in the statute, a restitution order could hold an individual liable for a greater amount of losses than those caused by his particular offense of conviction. This interpretation would be plainly inconsistent with how the principles of restitution and causation have historically been applied.

The crux of Amy's petition is the legal argument that 18 U.S.C. § 2259 permits a victim to receive mandatory restitution irrespective of whether the

victim's harm was proximately cause by the defendant. The government agreed with the district court that Section 2259 requires a showing of proximate cause between the victim's losses and the defendant's conduct. Courts across the country have followed and applied the proximate-cause requirement in imposing restitution under Section 2259. *United States v. Crandon*, 173 F.3d 122, 126 (3d Cir.1999); *United States v. Searle*, 65 Fed.Appx. 343, 346 (2d Cir.2003); *United States v. Doe*, 488 F.3d 1154, 1160 (9th Cir.2007); *United States v. Estep*, 378 F.Supp.2d 763, 770-72 (E.D.Ky.2005); *United States v. Raplinger*, No. 05-CR-49-LRR, 2007 WL 3285802, *2, *6 (N.D.Iowa Oct. 9, 2007). Although this circuit has not yet construed the proximate cause requirement under Section 2259, it is neither clear nor indisputable that Amy's contentions regarding the statute are correct.[2]

The district court permitted extensive briefing and conducted two evidentiary hearings on the issue of restitution, giving Amy a full opportunity to be heard through her able representative. The court's Memorandum Opinion and Order reflects careful and thoughtful consideration of the law and the facts, as well as sensitivity to Amy and other victims of child pornography. Despite the government's contrary

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[2] The district court has wide discretion and flexibility in determining the victim's damages for purposes of entering its restitution order. Denial of relief under this mandamus standard, of course, does not prejudice Amy's right to seek relief in a civil action.

position to the court's ultimate factual finding on proximate causation, the district court did not "so clearly and indisputably abuse[ ] its discretion as to compel prompt intervention by the appellate court." *In re United States*, 397 F.3d 274, 282 (5th Cir.2005).

We, therefore, DENY the petition for writ of mandamus.

DENNIS, Circuit Judge, dissenting:

I respectfully dissent. Congress emphasized in 18 U.S.C. § 2259 that it is mandatory for a court to issue a restitution order in favor of a victim who was caused harm by child pornography. The district court's decision not to order restitution contravenes the text of § 2259 and congressional intent; it amounts to a clear and indisputable error that should be corrected by a writ of mandamus.

The standard of review in this case is stated in *In re Dean*, 527 F.3d 391 (5th Cir.2008). "A writ of mandamus may issue only if (1) the petitioner has 'no other adequate means' to attain the desired relief; 2) the petitioner has demonstrated a right to the issuance of a writ that is 'clear and indisputable;' and (3) the issuing court, in the exercise of its discretion, is satisfied that the writ is 'appropriate under the circumstances.'" *Id.* at 394 (quoting *In Re United States*, 397 F.3d 274, 282 (5th Cir.2005)).

The first requirement is fulfilled for the reasons stated in the majority opinion. The third requirement

is fulfilled because a mandamus petition is the means Congress has provided to enable crime victims to defend their rights in criminal proceedings, *see* 18 U.S.C. § 3771(d)(3), and because there are no prudential reasons for denying the petition under the current circumstances, as there were in *In re Dean*. And, for the reasons set forth below, the second requirement is fulfilled because it is clear and indisputable that the district court's decision contravened 18 U.S.C. § 2259.

Congress provided in § 2259(a) that the district court "shall order restitution for any offense under this chapter," including Paroline's offenses. "The order of restitution under this chapter shall direct the defendant to pay the victim . . . the full amount of the victim's losses as determined by the court." *Id.* § 2259(b)(1). A "victim" is defined as "the individual harmed as a result of a commission of a crime under this chapter." *Id.* § 2259(c). "The full amount of the victim's losses," for purposes of the statute, "includes any costs incurred by the victim for –

> (A) medical services relating to physical, psychiatric, or psychological care;
>
> (B) physical and occupational therapy or rehabilitation;
>
> (C) necessary transportation, temporary housing, and child care expenses;
>
> (D) lost income;

(E) attorneys' fees, as well as other costs incurred; and

(F) any other losses suffered by the victim as a proximate result of the offense."

Id. § 2259(b)(3). In enacting § 2259, "Congress mandated broad restitution for a minor victim following an offender's conviction of federal child sexual exploitation and abuse offenses." *United States v. Crandon*, 173 F.3d 122 (3d Cir.1999). "Section 2259 is phrased in generous terms, in order to compensate the victims of sexual abuse for the care required to address the long term effects of their abuse." *United States v. Laney*, 189 F.3d 954, 966 (9th Cir.1999).

In the district court, the Government and petitioner presented evidence that she is a "victim" of Paroline's offense because she suffered an invasion of privacy and emotional and psychological harm as a result of Paroline's acquisition and possession of her sexually abusive childhood images. The district court found that she and the Government had satisfactorily proved these facts and that petitioner was therefore a "victim" for purposes of § 2259. This finding was consistent with the Supreme Court's view of the harm caused by child pornography. In *New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982), the Supreme Court held that the distribution of child pornography is not entitled to protection under the First Amendment. *Id.* at 764, 102 S.Ct. 3348. In so holding, the Supreme Court concluded that "[t]he use of children as subjects of pornographic materials is

very harmful to both children and the society as a whole," and "the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation." *Id.* at 759, 102 S.Ct. 3348. We have extended the reasoning of *Ferber* to the possession of child pornography, concluding for sentencing purposes that "children depicted in child pornography may be considered victims of the crime of receiving child pornography." *United States v. Norris*, 159 F.3d 926, 929 (5th Cir.1998).[1] As we explained in *Norris*, those who possess child pornography harm the children depicted because doing so: (1) "perpetuates the abuse initiated by the producer of the materials"; (2) "represents an invasion of the privacy of the child depicted"; and (3) "instigates the original production of child pornography by providing an economic motive for creating and distributing the materials." *Id.* at 929-30.

The district court therefore found that "significant losses are attributable to the widespread dissemination and availability of [petitioner's] images and the possession of those images by many individuals *such as Paroline.*" Slip op. at 16 (emphasis added). The district court further found, "[t]here is no doubt that everyone involved with child pornography – from the abusers and producers to the end-users and

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[1] Specifically at issue in *Norris* was whether the child depicted in a pornographic image may be considered a "victim" for purposes of applying the Sentencing Guidelines' offense grouping provisions. *See Norris*, 159 F.3d at 928-29.

possessors – contribute to [petitioner's] ongoing harm." *Id.* These findings necessarily require the conclusion that the Government and petitioner established that she has suffered losses proximately caused by Paroline's wrongful conduct.

But the district court nonetheless concluded that petitioner and the government had failed to prove that her losses were proximately caused by Paroline's crime because her losses were also contributed to by innumerable other persons who had acquired and possessed the same abusive child pornography of her. This was clear error. Petitioner, as the district court's findings establish, is entitled to restitution under § 2259: petitioner has suffered losses attributable, at least in part, to the defendant's possession of pornographic images. Based on these findings, the statute required the district court to calculate a dollar amount and impose restitution. Her right to restitution is not barred merely because the precise amount she is owed by Paroline is difficult to determine. Congress enacted § 2259 to provide broad restitution rights for victims who, like petitioner, have been harmed by the commission of child exploitation offenses, including possession of these sexually abusive images. Congress intended to afford child victims ample and generous protection and restitution, not to invite judge-made limitations patently at odds with the purpose of the legislation. Under the district court's analysis, the intent and purposes of § 2259 would be impermissibility nullified because the problem of allocating restitution present here will be

found in virtually *every* case where a child depicted in electronically disseminated pornography seeks restitution from those who unlawfully possess those images.

Section 2259 does "not impose[ ] a requirement of causation approaching mathematical precision." *United States v. Doe*, 488 F.3d 1154, 1160 (9th Cir.2007). Thus, a district court does not abuse its discretion in ordering restitution under § 2259 so long as its award is a reasonable estimate and is not based on an "arbitrary calculation." *See United States v. Laney*, 189 F.3d 954, 967 n. 14 (9th Cir.1999). The Seventh Circuit has noted that the strong congressional intent underlying § 2259 may justify a relaxation of the usual bar against speculative future losses, depending on the type of loss claimed by the victim of child exploitation crimes. *See United States v. Danser*, 270 F.3d 451, 455-56 & n. 5 (7th Cir.2001). Accordingly, in light of the strong Congressional intent and purposes of § 2259, and its unequivocal language, an appellate court should affirm the district court's restitution award "under Section 2259 if the district court is able to estimate, based upon facts in the record, the amount of the victim's loss with some reasonable certainty." *Doe*, 488 F.3d at 1160.

It is also worth noting two statutory provisions that could have aided the district court in calculating restitution. Congress, recognizing the difficulty that victims such as petitioner face in showing the amount of their losses, has assigned a conclusive damages award in civil suits brought under the same Act

creating the right to mandatory restitution for this offense. *See* 18 U.S.C. § 2255(a) ("Any person who, while a minor, was a victim of a violation of section . . . 2252 . . . and who suffers personal injury as a result of such violation may sue in any appropriate United States District Court and shall recover the actual damages such person sustains and the cost of the suit, including a reasonable attorney's fee. Any person as described in the preceding sentence shall be deemed to have sustained damages of no less than $150,000 in value."). In addition, § 2259(d)(2) provides:

> Multiple crime victims – In a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings.

18 U.S.C. § 2259(d)(2). Although this subsection literally applies only to cases involving multiple crime victims, it also analogically expresses legislative intent as to how the district court should proceed to fashion a reasonable procedure to effectuate the chapter when the number of offenders involved in the violation of the victim's rights makes it impracticable to accord her all of those rights.

For these reasons, I would vacate the district court's order denying the request for restitution and remand the case to the district court with

instructions to reopen and reconsider the petitioner's request consistently with § 2259's broad and generous provisions mandating restitution for all victims harmed by child pornography.

United States District Court
EASTERN DISTRICT OF TEXAS
Tyler

UNITED STATES OF AMERICA

V.

DOYLE RANDALL PAROLINE

Date of Original Judgment:
6/10/2009
(Or Date of Last Amended Judgment)

AMENDED JUDGMENT IN A CRIMINAL CASE

Case Number:
6:08CR00061-001
USM Number:
15100-078

F.R. "BUCK" FILES/
J. BRETT HARRISON
Defendant's Attorney

Reason for Amendment:

☐ Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))

☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))

☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))

☐ Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))

☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reason (18 U.S.C. § 3582(c)(1))

☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))

☐ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)

☐ Direct Motion to District Court Pursuant ☐ 28 U.S.C. § 2255 or ☐ 18 U.S.C. § 3559(c)(7)

☑ Modification of Restitution Order (18 U.S.C. § 3664)

THE DEFENDANT:

☑ pleaded guilty to count(s) 1 OF THE INFORMATION

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☐ was found guilty on count(s) _____ after a plea of not guilty. _____

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC § 2252(a)(4)(B)	Possession of Material Involving the Sexual Exploitation of Children	07/11/2008	1

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant shall notify the United States Attorney for this district within 30

days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material changes in economic circumstances.

12/7/2009
Date of Imposition of Judgment

/s/ Leonard Davis
Signature of Judge

Leonard Davis
United States District Judge
Name and Title of Judge

3/11/10
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: 24 Months

☑ The court makes the following recommendations to the Bureau of Prisons:

Defendant participate in the Sex Offender Treatment Program and be designated to an FCI that offers the Sex Offender Treatment Program as near to Athens, Texas, preferably Seagoville, if eligible.

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY
UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 10 Years.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter as determined by the court.

☑ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☑ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

☑ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record, personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL SUPERVISED RELEASE TERMS

The defendant shall provide the probation officer with access to any requested financial information for purposes of monitoring his efforts to obtain and maintain lawful employment.

The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et. seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense.

Under the guidance and direction of the U.S. Probation Office, the defendant shall participate in a sex offender treatment program which may include the application of physiological testing instruments. The defendant shall pay any cost associated with treatment and testing.

The defendant shall not have contact of any kind with children under the age of 18 unless supervised by an adult approved by the probation officer.

The defendant shall not possess or view any images in any form of media or in any live venue that depicts sexually explicit conduct as defined in 18 U.S.C. § 2256(2).

The defendant shall submit to a search of his person, property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects at any time, with or without a

warrant, by any law enforcement or probation officer with reasonable suspicion concerning unlawful conduct or a violation of supervised release.

The defendant shall allow the U.S. Probation Office to install software designed to monitor computer activities on any computer the defendant is authorized to use. This may include, but is not limited to, software that may record any and all activity on the computers the defendant may use, including the capture of keystrokes, application information, Internet use history, e-mail correspondence, and chat conversations. The defendant will pay any costs related to the monitoring of his/her computer usage.

The defendant shall advise anyone in his/her household that any computer in the household may be subject to computer monitoring.

The defendant shall not attempt to remove, tamper with, or in any way circumvent the monitoring software.

The defendant shall disclose all on-line account information, including user names and passwords, to the U.S. Probation Office. The defendant shall also, if requested, provide a list of all software/hardware on his computer, as well as telephone, cable, or Internet service provider billing records, and any other information deemed necessary by the probation office to monitor the defendant's computer usage.

The defendant shall provide the probation officer with access to any requested financial information

for purposes of monitoring his compliance with the imposed computer access/monitoring conditions.

The defendant shall not purchase, possess, have contact with, or use devices to include cellular telephones with photographic capability; cellular telephones with internet capability; laptop computers (other than a computer approved by the probation office which may be subject to monitoring); iPods; Personal Digital Assistants (PDAs); portable data storage devices such as thumb drives and Flash memory; or any other type of portable electronic device that is capable of communicating data via modem, wireless, or dedicated connection. The defendant shall also refrain from the purchase, possession, or use of digital cameras; digital recorders; or any other type of recording and/or photographic equipment.

CRIMINAL MONETARY PENALTIES

The defendant must pay the following total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 100.00	$ 0.00	$ 0.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
"AMY" C/O THE MARSH LAW FIRM		$0.00	0%
TOTALS	_____	$ **0.00**	

☐ Restitution amount ordered pursuant to plea agreement
$ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6, may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

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* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, for offenses committed on or after September 13, 1994 but before April 23, 1996.

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for ☐ fine ☐ restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ☑ Lump sum payment of $ 100.00 due immediately, balance due

☐ not later than _____ , or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D or, ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to: the U.S. District Court, Fine & Restitution Section. P.O. Box 570, Tyler, TX 75710.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

636 F.3d 190 (5th Cir. 2011)

In re: AMY UNKNOWN, Petitioner.

United States of America, Plaintiff-Appellee,

Doyle Randall Paroline, Defendant-Appellee,

v.

Amy Unknown, Movant-Appellant.

Nos. 09-41238, 09-41254.

United States Court of Appeals, Fifth Circuit.

March 22, 2011

[Copyrighted Material Omitted]

James R. Marsh, Marsh Law Firm, White Plains, NY, Paul G. Cassell (argued), Salt Lake City, UT, for Amy Unknown.

Stanley G. Schneider, Schneider & McKinney, P.C., Houston, TX, Fred Rimes Files, Jr. (argued), Bain, Files, Jarrett, Bain & Harrison, Tyler, TX, for Paroline.

Amanda Louise Griffith, Asst. U.S. Atty., U.S. Attorney's Office, Eastern District of Texas, Plano, TX, William D. Baldwin, Traci Lynne Kenner (argued), Asst. U.S. Attorneys, U.S. Attorney's Office, Eastern District of Texas, Tyler, TX, for U.S.

Appeals from the United States District Court for the Eastern District of Texas.

Before JONES, Chief Judge, and JOLLY and GARZA, Circuit Judges.

EDITH H. JONES, Chief Judge:[1]

"Amy," the victim of childhood sexual abuse and of a widely broadcast set of photos depicting her abuse, has pursued restitution under the Crime Victims Rights' Act ("CVRA"), 18 U.S.C. § 3771(a)(6), against defendants who viewed her photos on the internet. Her appeal from the district court's denial of relief arrives in an unusual posture. She filed both a direct appeal under 28 U.S.C. § 1291 and a petition for a writ of mandamus under 18 U.S.C. § 3771(d)(3). A panel of this court denied mandamus. *In re Amy,* 591 F.3d 792 (5th Cir.2009). This panel was assigned, for ease of administration, both the direct appeal and Amy's motion for panel rehearing of her mandamus petition. We need not reach the issue whether a crime victim has a right to a direct appeal, because the district court clearly and indisputably erred in grafting a proximate causation requirement onto the CVRA. Consequently, Appellant's petition for panel rehearing is granted; her petition for a writ of mandamus is likewise granted, and the case is remanded to the district court to determine the amount of restitution owed by Doyle Randall Paroline.

I. Background

The National Center for Missing and Exploited Children ("NCMEC"), which filed a brief in the

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[1] Judges JOLLY and GARZA concur, except in Part II, which they consider advisory.

district court, reports that its analysts have identified over 35,000 images of Amy's abuse among the evidence in over 3,200 child pornography cases since 1998. NCMEC describes the content of these images as "extremely graphic."

Images of Amy were among the hundreds of images of child sexual abuse that defendant Doyle Randall Paroline possessed. Paroline pled guilty to possession of child pornography in January 2009. At sentencing, Amy filed a victim impact statement and request for restitution.[2] *See* 18 U.S.C. § 2259(a). The latter sought $3,367,854, the cumulative cost of her lost income, attorney's fees, and ongoing psychological care. The government initially supported (and formally presented) Amy's request for restitution. NCMEC also filed a brief that detailed the lasting impact of sexual assault and the victim's additional suffering from the knowledge that people continue to view and circulate images of her abuse. Additional evidence before the district court included an expert evaluation of Amy's psychological condition, economic report

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[2] Although the present lawsuit focuses on restitution, the CVRA guarantees a number of other rights as well. Among these are (1) reasonable protection from the accused, (2) notice of any court or parole proceedings involving the accused, (3) attendance at such proceedings, (4) an opportunity to be heard at proceedings involving release, plea, sentencing or parole, (5) communication with the government's attorney in the case involving the victim, (6) avoidance of delay, and (7) "[t]he right to be treated with fairness and with respect for the victim's dignity and privacy." 18 U.S.C. § 3771(a).

estimating her lost earnings, and scholarly articles regarding the general effects of child pornography. *United States v. Paroline,* 672 F.Supp.2d 781, 792 (E.D.Tex.2009).

Notwithstanding the heartrending evidence, the district court denied Amy's request for restitution. The court held that the CVRA required Amy and the government to prove that Paroline's possession of Amy's images – as distinct from the thousands of other individuals who continue to possess and view the images – proximately caused the injuries for which she sought restitution. *Id.* at 791-92. The government, in advancing Amy's restitution claim, now accepts the court's premise that proximate causation is required for all types of injury listed in § 2259.

Amy immediately appealed the district court's decision. She filed both a direct appeal of the court's final order and a petition for writ of mandamus authorized by the CVRA, 18 U.S.C. § 3771(d)(3). A divided panel of this court refused the mandamus request, upholding the district court's conclusion that proximate causation permeates § 2259. *In re Amy,* 591 F.3d 792, 794-95 (5th Cir.2009) ("Although this circuit has not yet construed the proximate cause requirement under Section 2259, it is neither clear nor indisputable that Amy's contentions regarding the statute are correct."). In response, Amy has sought both panel and en banc rehearing of her mandamus petition. Because her direct appeal was

assigned to this panel, this panel was also assigned for purposes of rehearing the petition for mandamus.[3]

II. Jurisdiction

The first question before this court is what sort of jurisdiction we have to review the district court's order. Given our conclusion that the writ of mandamus should be granted, we need not resolve the problem, posed by divided sister circuit opinions, whether the CVRA allows a victim to bring a direct appeal. The difficulty of this issue ought to be explained, however, for the benefit of future panels.

The CVRA provides that: "If the district court denies the relief sought, the movant [victim] may petition the court of appeals for a writ of mandamus." 18 U.S.C. § 3771(d)(3). As to the government, "In any appeal in a criminal case, the Government may assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates." 18 U.S.C. § 3771(d)(4). The CVRA does not state that victims' sole avenue for review is the writ of mandamus, nor does it authorize the government

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[3] This court heard oral arguments in Amy's direct appeal on November 4, 2010. The decision to hear arguments did not commit the court to a conclusion on the availability of direct appeal. We remain the rehearing panel for purposes of Amy's mandamus petition. *See United States v. Jackson*, 559 F.3d 368 (5th Cir.2009) (conducting panel rehearing of the decision issued by a differently composed prior panel in *United States v. Jackson*, 285 Fed.Appx. 149 (5th Cir.2008)).

alone to bring a direct appeal.[4] In any event, 28 U.S.C. § 1291 generally authorizes direct appeal by parties aggrieved by final district court judgments.

The government moved to dismiss Amy's direct appeal filed under § 1291, contending that mandamus is her exclusive appellate vehicle. The CVRA's express provisions confirm this proposition, according to the government and Paroline, abetted by the interpretive presumption that Congress has "legislated against the background of our traditional legal concepts. . . ." *United States v. United States Gypsum Co.*, 438 U.S. 422, 437, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978). Prominent among the relevant legal traditions is that nonparties may not file appeals. The Supreme Court has long recognized "[t]he rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment. . . ." *Marino v. Ortiz*, 484 U.S. 301, 304, 108 S.Ct. 586, 98 L.Ed.2d 629 (1988) (citing *United States ex rel. Louisiana v. Jack*, 244 U.S. 397, 402, 37 S.Ct. 605, 61 L.Ed. 1222 (1917)). Crime victims have not been recognized as parties,

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[4] A related argument concerns the collateral order doctrine. The Supreme Court has recently reiterated the doctrine's rare applicability. *Mohawk Indus., Inc. v. Carpenter*, ___ U.S. ___, 130 S.Ct. 599, 175 L.Ed.2d 458 (2009). A condition for the collateral order doctrine is that the order at issue be "effectively unreviewable on appeal." *Id.* at 604. In the present case, the government argues that its ability to appeal a restitution order defeats this condition; Amy contends that such an order remains effectively unreviewable *as to her*. We present this controversy but need not resolve it.

and the Federal Rules of Criminal Procedure do not allow them to intervene as parties to a prosecution. Circuit courts have applied this rule in the context of restitution. Under the Victim and Witness Protection Act (VWPA), the CVRA's predecessor that made restitution an option rather than mandatory, the Ninth Circuit held that "[n]owhere in the statute does Congress suggest that the VWPA was intended to provide victims with a private remedy to sue or appeal restitution decisions. . . ." *United States v. Mindel,* 80 F.3d 394, 397 (9th Cir.1996).[5] The government contends that decades of experience, a general prohibition on non-party appeals, and its application in the context of victims' rights stand against Amy's hope to invoke § 1291 to appeal the denial of restitution.

Moreover, a pair of recent decisions expressly denies direct appeals under the CVRA. *See United States v. Hunter,* 548 F.3d 1308 (10th Cir.2008),

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[5] The Ninth Circuit was not alone in its interpretation of the VWPA. *See United States v. Palma,* 760 F.2d 475, 479 (3d Cir.1985) ("the victim . . . is not made a party to the sentencing proceeding"), *United States v. Brown,* 744 F.2d 905, 909-10 (2d Cir.1984) ("the victim is not a party to the sentencing hearing. . . . Neither can he appeal a determination he deems inadequate."), *United States v. Franklin,* 792 F.2d 998, 999-1000 (11th Cir.1986) ("no statute . . . give[s] us the authority to entertain an appeal by a victim, such as appellant, who was not a party to the sentencing proceeding in the district court."), *United States v. Kelley,* 997 F.2d 806, 807 (10th Cir.1993) ("We . . . hold that [the victim] has no standing to prosecute this appeal.").

United States v. Aguirre-Gonzalez, 597 F.3d 46 (1st Cir.2010). *Hunter* anchored its statutory interpretation in three provisions of the CVRA: the authorization of mandamus review for victims, the government's ability to bring a direct appeal on a victim's behalf, and the statement that "[n]othing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." *Id.* at 1315-16 (quoting 18 U.S.C. § 3771(d)(5)). The first two provisions support *Hunter*'s conclusion by simple negative implication. The last of them, according to the court, implies that affording victims full appellate rights could compromise the government's ability to enter plea agreements because a victim's appeal could re-open the negotiated judgment, removing the certainty that motivates defendants to settle. *Id. Hunter* also suggests that precedent from other circuits supports its conclusion. It cites two decisions that applied traditional abuse-of-discretion standards while professing to conduct mandamus review. *Id.* at 1315 n. 5 (citing *Kenna v. U.S. Dist. Court,* 435 F.3d 1011, 1017 (9th Cir.2006), *In re W.R. Huff Asset Management Co., LLC,* 409 F.3d 555, 562-63 (2d Cir.2005)). By "disguising" ordinary appellate review as mandamus review in § 3771(d)(3) petitions, these decisions support the conclusion that victims have no right to a direct appeal: "To hold otherwise would effectively grant victims two opportunities to appeal, both of which

would be subject to identical appellate standards of review – a clearly inefficient and illogical scheme." *Id.*[6]

Amy asserts that the propriety of her direct appeal is not expressly foreclosed by the CVRA and actually finds support in pre-CVRA authorities – as Congress is presumed to have been aware – as well as recent caselaw. Before the passage of the CVRA, this court heard appeals from non-parties with a direct interest in aspects of criminal prosecutions. *United States v. Briggs,* 514 F.2d 794 (5th Cir.1975) (holding that unindicted co-conspirators had standing to challenge passages in an indictment); *United States v. Chagra,* 701 F.2d 354 (5th Cir.1983) (allowing newspaper to appeal order restricting access to court hearing). A rape victim was authorized in *Doe v. United States,* 666 F.2d 43, 46 (4th Cir.1981), to appeal the trial court's ruling on a rape shield law.

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[6] If *Hunter* is correct that courts are cloaking their ordinary review in mandamus language, that fact suggests unease with denying victims a direct appeal, the very conclusion *Hunter* advances. As discussed below, this circuit insists on a single mandamus standard. As a corollary, this court can neither follow nor condone the shrouded direct review in *Huff* and *Kenna*. *See infra* Part III. The *Hunter* opinion also overlooks precedent that favors direct appeal. Neither *Hunter* nor its successor, *In re Antrobus,* 519 F.3d 1123 (10th Cir.2008), discusses the Sixth Circuit's decision in *United States v. Perry,* 360 F.3d 519 (6th Cir.2004). *Perry* distinguished the entire corpus of VWPA precedent for the fact that restitution was not mandatory under that statute, but *Hunter* cites no fewer than three such cases in support of its holding.

Most important, the Third Circuit held, albeit perfunctorily, that "We have appellate jurisdiction pursuant to 28 U.S.C. § 1291" to hear the appeal of a purported victim seeking restitution under the VWPA. *United States v. Kones,* 77 F.3d 66, 68 (3rd Cir.1996). Based on the conflicting pre-CVRA cases cited by Amy and the government, one may legitimately wonder *which* legal landscape Congress is presumed to have been viewing when it crafted the CVRA.

The Third Circuit also ruled, in a split panel decision issued while the CVRA was under consideration in Congress, that a crime victim could appeal pursuant to § 1291 the district court's method of enforcing the restitution order. *United States v. Perry,* 360 F.3d 519 (6th Cir.2004).[7]

Finally, post-CVRA, the Sixth Circuit offered indirect support for Amy's position when it allowed a direct appeal under the CVRA. *See In re Siler,* 571 F.3d 604 (6th Cir.2009). Although the events in *Siler* began with a criminal investigation, the lawsuit at

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[7] Amy argues that statutory developments between the VWPA and the CVRA have nullified pre-CVRA holdings that victims have no independent rights in criminal prosecutions. This interpretation of the shift from "may," 18 U.S.C. § 3663(a)(1)(A), to "shall," 18 U.S.C. § 3663A(a)(1), has persuaded at least one court. *Perry,* 360 F.3d at 531 ("under the VWPA, a court did not have to award restitution. . . Thus, particular features of the VWPA scheme – features absent from the [CVRA] – explain the decisions that deny standing to appeal a VWPA restitution order.").

issue was a civil action against the police for violations of 42 U.S.C. § 1983. The plaintiffs hoped to use a provision of the CVRA to gain access to the defendants' Presentence Reports (PSRs), which they believed contained evidence that would support their case. *Id.* at 607-08. In accepting the appeal, however, the Sixth Circuit noted that "the issue now before us is unrelated to the [criminal] case against the defendants."[8] *Id.* at 606-07.

To summarize briefly the arguments and authorities cited by the "parties" is not to resolve whether a § 1291 appeal is available to a victim seeking relief for any of her rights, including restitution, under the CVRA. Resolution is difficult because the cases employ conflicting reasoning. *Perry,* which involved a dispute among victims who were to share an award, focused on the victims' property rights in their restitution. 360 F.3d at 530-31. *Kones* and *Hunter*

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[8] The Tenth Circuit has attempted to substantiate the distinction between victims' rights in civil and criminal contexts. *Hunter,* 548 F.3d at 1312. "Civil cases," that court reasoned, "often implicate the pecuniary rights of non-parties. . . . Criminal trials, of the other hand, place an individual citizen against the United States government." *Id.* To be fair, although *Hunter* was a CVRA case, it addressed the entire panoply of victims' rights contained in the statute. In the specific context of restitution, *Hunter*'s distinction could not be less accurate. A restitution order implicates only the pecuniary interests of a criminal defendant, and the dispute over how much restitution is due occurs between a criminal and his victim – in fact, the victim's ability to pursue this dispute without government involvement is precisely the issue in this case.

concerned denials of restitution, but the former permitted appeal under the optional-restitution VWPA, while the latter denied appeal under the mandatory-restitution CVRA. The cases also ignore their predecessors: *Perry* fails to acknowledge *Kones*, while *Hunter* does not cite either *Perry* or *Kones*. Federal victim rights legislation has steadily evolved toward expanding the formal rights and role of victims in the prosecutorial process. Nevertheless, when Congress as recently as the 1980s failed to offer any appellate rights to review restitution orders, which path did it more likely take when creating appellate redress in the CVRA? Did it *add* the mandamus vehicle to a victim's pre-existing right to appeal under § 1291? Or did it craft "mandamus" in lieu of a non-existent direct appeal right for non-parties? If the latter course was chosen, did Congress render to victims a mere formality, given the traditionally narrow scope of mandamus relief, or did it apply that term to a more substantial vehicle for redress of victims' grievances? We need not resolve the uncertainties, because our analysis leads to the conclusion that, even under the narrow standard of traditional mandamus review, the district court's judgment cannot stand. This conclusion would perforce favor Amy if a § 1291 de novo appellate standard applied.

III. Standard of Review

When a panel rehearing is granted, the standard of review is the same one that applied at the original hearing. *See, e.g., Chicago Bridge & Iron Co. N.V. v.*

FTC, 534 F.3d 410, 422 (5th Cir.2008). This court evaluates a petition for writ of mandamus under the CVRA according to the standard announced in *In re Dean*, 527 F.3d 391 (5th Cir.2008). *Dean* held that mandamus is appropriate "only if (1) the petitioner has no other adequate means to attain the desired relief; (2) the petitioner has demonstrated a right to the issuance of a writ that is clear and indisputable; and (3) the issuing court . . . is satisfied that the writ is appropriate under the circumstances." *Id.* at 394 (internal quotations omitted). In announcing the test for mandamus under the CVRA, the *Dean* decision refers to this court's holding in *In re United States*, 397 F.3d 274 (5th Cir.2005), as well as the Supreme Court's decision in *Cheney v. United States District Court*, 542 U.S. 367, 124 S.Ct. 2576, 159 L.Ed.2d 459 (2004), neither of which concerns the CVRA or restitution. By relying on general mandamus precedent, *In re Dean* confirms that a single mandamus standard reigns in the Fifth Circuit, regardless of the context in which the petition arises.[9]

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[9] We pause to note, as part of the jurisdictional conundrum, that our sister circuits are far from united in the standard to be applied. At least two circuits have applied lower standards of review when faced with a mandamus petition under the CVRA. *See Kenna v. U.S. Dist. Court*, 435 F.3d 1011, 1017 (9th Cir.2006) ("we must issue the writ whenever we find that the district court's order reflects an abuse of discretion or legal error"), *In re W.R. Huff Asset Management Co., LLC*, 409 F.3d 555, 562-63 (2d Cir.2005) (invoking § 3771(d)(3), the mandamus review provision, but concluding that "the district court's determination under the CVRA should be reviewed for abuse of discretion.").

(Continued on following page)

IV. Discussion

As the Supreme Court has noted, the "hurdles" limiting use of mandamus, "however demanding, are not insuperable." *Cheney,* 542 U.S. at 381, 124 S.Ct. 2576. This court's initial denial of Amy's petition for a writ of mandamus focused on the second of the three *Cheney* factors – *i.e.,* whether Amy's right to restitution is "clear and indisputable." The other two factors played no part in the denial. As to the first factor, the court cited the Tenth Circuit's *Hunter* decision in holding that "the petitioner likely has no other means for obtaining review of the district court's decision not to order restitution." *In re Amy,* 591 F.3d at 793. Based on the preceding discussion, we can affirm this conclusion without endorsing *Hunter*'s holding that a victim has no right to direct appeal.

These standards appear to be more amenable to reversing the district court than the general mandamus standard. *Cf. In re The City of New York,* 607 F.3d 923, 928-29 (2d Cir.2010) (applying *Cheney*'s three-part test), *Perry v. Schwarzenegger,* 591 F.3d 1147, 1156 (9th Cir.2010) (citing *Cheney* and applying an equivalent five-part test from Ninth Circuit precedent). The Tenth Circuit, however, preceded this court in applying the traditional mandamus standard to a victim's appeal under the CVRA. *See In re Antrobus,* 519 F.3d 1123 (10th Cir.2008). As the Tenth Circuit explained, "[m]andamus is a well worn term of art in our common law tradition." *Id.* at 1127. Moreover, "[i]t is a well-established rule of construction that where Congress uses terms that have accumulated settled meaning under the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *Neder v. United States,* 527 U.S. 1, 21, 119 S.Ct. 1827, 1840, 144 L.Ed.2d 35 (1999).

Likewise, the third factor in *Cheney* – whether the writ is appropriate under the circumstances – favors Amy's petition. Whatever Congress envisioned regarding a victim's right to direct appeal, the CVRA expressly authorizes mandamus under these circumstances. 18 U.S.C. § 3771(d)(3).

The remaining question is whether Amy has a "clear and indisputable" right to restitution. Given more time to ponder and research, we have reconsidered this question. Courts are required to award victims of child sex abuse "the full amount of the victim's losses." 18 U.S.C. § 2259(b)(1). In this context,

> "full amount of the victim's losses" includes any costs incurred by the victim for –
>
> (A) medical services relating to physical, psychiatric, or psychological care;
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> (B) physical and occupational therapy or rehabilitation;
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> (C) necessary transportation, temporary housing, and child care expenses;
>
> (D) lost income;
>
> (E) attorneys' fees, as well as other costs incurred; and
>
> (F) any other losses suffered by the victim as a proximate result of the offense.

18 U.S.C. § 2259(b)(3).

The district court denied Amy's request for restitution because the government failed to prove "what losses, if any, were proximately caused by *Paroline's possession* of Amy's two pornographic images. . . ." *United States v. Paroline*, 672 F.Supp.2d 781, 783 (E.D.Tex.2009) (emphasis added). It reasoned that the statute, precedent, and compliance with the Eighth Amendment compel the conclusion that each category of loss in § 2259(b)(3) includes the element of proximate causation, even though the statute confines that requirement to the "catchall" provision, subsection F. This conclusion is clearly and indisputably wrong.

The structure and language of § 2259(b)(3) impose a proximate causation requirement only on miscellaneous "other losses" for which a victim seeks restitution. As a general proposition, it makes sense that Congress would impose an additional restriction on the catchall category of "other losses" that does not apply to the defined categories. By construction, Congress knew the kinds of expenses necessary for restitution under subsections A through E; equally definitionally, it could not anticipate what victims would propose under the open-ended subsection F.

Comparing the language of § 2259 with other restitution statutes affirms the conclusion that proximate causation applies only to the catchall category of harms. Under the VWPA, a victim is "a person *directly and proximately* harmed as a result of the commission of an offense. . . ." 18 U.S.C. § 3663A(a)(2) (emphasis added). In contrast, § 2259, enacted 14 years later as part of the MVRA, defines a victim as

"the individual harmed as *a result of* a commission of a crime. . . ." 18 U.S.C. § 2259(c) (emphasis added).[10] Comparing these statutes reveals that Congress abandoned the proximate causation language that would have reached all categories of harm via the definition of a victim. This change is consistent with the reasons for enacting a second generation of restitution statutes. *See, e.g., Unites States v. Ekanem,* 383 F.3d 40, 44 (2d Cir.2004) (noting "the intent and purpose of the MVRA to expand, rather than limit, the restitution remedy."), *United States v. Perry,* 360 F.3d 519, 524 (6th Cir.2004) ("The new law unquestionably reflects a dramatically more 'pro-victim' congressional attitude. . . ."). The evolution in victims' rights statutes demonstrates Congress's choice to abandon a global requirement of proximate causation.

In applying proximate causation beyond the catchall, the district court cited two Supreme Court cases interpreting statutory lists. *Paroline,* 672

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[10] The CVRA contains a definition of "crime victim" that parallels the VWPA and incorporates proximate causation: "a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia." 18 U.S.C. § 3771(e). We focus on the MVRA definition, however, because Amy's claim to restitution rests on that statute. The district court appreciated this fact and therefore turned to a provision of the MVRA to find a proximate causation requirement, *viz.* § 2259(b)(3). To evaluate the district court's interpretation, we look to other sections of the same statute for guidance. The parties do not challenge whether Amy is a victim. Nevertheless, the MVRA's internal definition of victim is probative of the meaning of § 2259(b)(3).

F.Supp.2d at 788 (citing *Porto Rico Railway, Light & Power Co. v. Mor*, 253 U.S. 345, 40 S.Ct. 516, 64 L.Ed. 944 (1920), *Fed. Mar. Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 93 S.Ct. 1773, 36 L.Ed.2d 620 (1973)). In *Porto Rico Railway*, the Supreme Court stated that "When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." *Id.* at 348, 40 S.Ct. 516.

But there are lists, and then there are other lists. Here, the statute does not present the types of recoverable costs in a series, separated by commas. Instead, it begins a sentence ("'full amount of the victim's losses' includes any costs incurred by the victim for – ") and then lists six different endings for that sentence. From the double-dash that opens the list to the semicolons that separate each of its elements, the grammatical structure of § 2259(b)(3) is unlike the statute in *Porto Rico Railway*. The latter was a blurry composite of lists, separated by commas and without any numbering or introductory punctuation.[11] Grammar alone counsels against applying the rule of *Porto Rico Railway* to the current statute.

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[11] The relevant provision stated: "Said District Court shall have jurisdiction of all controversies where all of the parties on either side of the controversy are citizens or subjects of a foreign state or states, or citizens of a state, territory, or district of the United States not domiciled in Porto Rico. . . " *Porto Rico Ry.*, 253 U.S. at 346, 40 S.Ct. 516.

Even if the interpretive approach of *Porto Rico Railway* applied here, so would the Court's comment that the statute in question "manifests a general purpose . . . [and i]f the application of the cause were doubtful, we should so construe the provision as to effectuate the general purpose of Congress." *Id.* In the case of § 2259, the statute manifests a congressional purpose to award broad restitution. *See United States v. Crandon,* 173 F.3d 122, 126 (3d Cir.1999) ("Congress [in § 2259] mandated broad restitution for a minor victim. . . ."), *United States v. Laney,* 189 F.3d 954, 966 (9th Cir.1999) ("Section 2259 is phrased in generous terms, in order to compensate the victims of sexual abuse for the care required to address the long term effects of their abuse."). In light of the recognized purpose for which Congress crafted the list in § 2259(b)(3), a more faithful application of *Porto Rico Railway* would confine the proximate causation requirement to the catchall category of subsection F.

The district court relied on another Supreme Court case addressing an interpretive question that is the inverse of the one here. *Fed. Mar. Comm'n v. Seatrain Lines, Inc.,* 411 U.S. 726, 93 S.Ct. 1773, 36 L.Ed.2d 620 (1973). The statute in *Seatrain* included a seven-category list like the one in § 2259(b)(3). All but one of the categories referred to business relationships that were ongoing. The remaining category was ambiguous, and the Federal Maritime Commission sought to use it to regulate a one-time event. *Id.* at 732-33, 93 S.Ct. 1773. The question before the Court, therefore, was unlike the present case:

whether to apply a condition present in all but one category to the sole outlier (as opposed to applying a restriction present in only one category to all of the others, as the district court did here). The Supreme Court resolved this question by looking to all six of the other categories and following their example: "of the seven categories, six are expressly limited to ongoing arrangements. . . ." *Id.* at 733-34, 93 S.Ct. 1773. The Court found it especially significant that the catchall category shared the restriction. *Id.* at 734, 93 S.Ct. 1773.

Here, the district court seizes on *Seatrain*'s comments about catchall categories to justify a proximate causation requirement, which appears in the catchall, subsection F. *Paroline,* 672 F.Supp.2d at 788. This is a misapplication of *Seatrain.* In *Seatrain,* the special role of a catchall category was not determinative because the catchall imposed the same condition as the other uncontested categories. It is just as likely that the Court's other rationale – majority rule among the categories – controlled the outcome. Moreover, the treatise from which the Court drew its interpretation of catchalls includes the following restriction: "But this is so, only if the result is consistent with the legislative intent. . . . The rule will not be applied where there is 'no ambiguity,' or to thwart the legislative intent. . . ." 2 J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 4908 (3d ed.1943). The Supreme Court understood this restriction. As in *Porto Rico Railway,* the Court in *Seatrain* took its cues from "the

statutory scheme" and what it says about congressional intent. 411 U.S. at 734, 93 S.Ct. 1773. As illustrated in the citations above, congressional intent is no mystery in the context of § 2259. Had the district court adhered more closely to the precedent it cited, it would have reached the opposite conclusion.

Restricting the "proximate result" language to the catchall category in which it appears does not open the door to limitless restitution. The statute itself includes a general causation requirement in its definition of a victim: "For purposes of this section, the term 'victim' means the individual harmed *as a result* of a commission of a crime under this chapter. . . ." 18 U.S.C. § 2259(c) (emphasis added). The district court displayed due care in analyzing whether Amy is a victim of Paroline's crime of possessing – but not creating – images of her sexual assault. *Paroline,* 672 F.Supp.2d at 785-87. The finding that Amy is a victim under § 2259(c) rests on the Supreme Court's reasoning in *New York v. Ferber,* 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982) as well as this court's holding in *United States v. Norris,* 159 F.3d 926 (5th Cir.1998).[12] In *Norris* this court rejected the

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[12] The causation reasoning in *Norris* bears extended reproduction:

> The consumer, or end recipient, of pornographic materials may be considered to be causing the children depicted in those materials to suffer as a result of his actions in at least three ways.

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argument that possessors of child pornography are only an "indirect or secondary" cause of the victim's harm. 159 F.3d at 928-29. Given the statute's built-in causation requirement and the volume of causation evidence in the context of child pornography, fears over excessive punishment are misplaced. We therefore do not share the district court's concern that rejecting a proximate causation requirement would place § 2259 in danger of offending the Eighth Amendment. *See Paroline,* 672 F.Supp.2d at 788 n. 9.

A second reason to doubt that Paroline will pay an unconstitutional price for his crime is the possibility that he can seek contribution from other persons who possess Amy's images. Although the statute

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> First, the simple fact that the images have been disseminated perpetuates the abuse initiated by the producer of the materials. . . .
>
> Second, the mere existence of child pornography represents an invasion of the privacy of the child depicted. Both the Supreme Court and Congress have explicitly acknowledged that the child victims of child pornography are directly harmed by this despicable intrusion on the lives of the young. . . .
>
> Third, the consumer of child pornography instigates the original production of child pornography by providing an economic motive for creating and distributing the materials. . . .
>
> Any of these effects, stemming directly from a consumer's receipt of or willingness to receive child pornography, would amply justify the conclusion that a child depicted in the pornographic images was a "victim" of that crime.

159 F.3d at 929-30.

holds a criminal responsible for "the full amount of the victim's losses," 18 U.S.C. § 2259(b)(1), it instructs the court to enforce the restitution award "in accordance with section 3664," 18 U.S.C. § 2259(b)(2). Section 3664 states that the court may enforce a restitution order "by all other available and reasonable means." 18 U.S.C. § 3664(m)(1)(A)(ii). Among these is joint and several liability. Holding wrongdoers jointly and severally liable is no innovation. *See, e.g.*, 42 U.S.C. § 9607(a) (CERCLA). It will, however, enable Paroline to distribute "the full amount of the victim's losses" across other possessors of Amy's images. Among its virtues, joint and several liability shifts the chore of seeking contribution to the person who perpetrated the harm rather than its innocent recipient.

This court offers no opinion on the amount of restitution due in Amy's particular circumstances. The district court has conducted two evidentiary hearings already. It is best qualified to determine Amy's total harm and the fraction due to Paroline's crime.

V. Conclusion

Incorporating a proximate causation requirement where none exists is a clear and indisputable error. Amy is entitled to receive restitution under the CVRA. We therefore GRANT Amy's petition for panel rehearing and likewise GRANT her petition for a writ of mandamus. Because the district court did not

quantify the amount of restitution to which Amy is entitled or the fraction attributable to Paroline, the case is REMANDED for resolution of that issue.

697 F.3d 306 (5th Cir. 2012)

In re Amy UNKNOWN, Petitioner.

United States of America, Plaintiff-Appellee,

Doyle Randall Paroline, Defendant-Appellee,

v.

Amy Unknown, Movant-Appellant.

United States of America, Plaintiff-Appellee,

v.

Michael Wright, Defendant-Appellant.

Nos. 09-41238, 09-41254, 09-31215.

United States Court of Appeals, Fifth Circuit.

October 1, 2012

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Appeals from the United States District Courts for the Eastern District of Texas and the Eastern District of Louisiana.

Before STEWART, Chief Judge, and KING, JOLLY, DAVIS, JONES, SMITH, GARZA, DENNIS, CLEMENT, PRADO, OWEN, ELROD, SOUTHWICK, HAYNES and GRAVES, Circuit Judges.[1]

EMILIO M. GARZA, Circuit Judge, joined by CARL E. STEWART, Chief Judge, and E. GRADY JOLLY, EDITH H. JONES, EDITH BROWN CLEMENT, PRADO, OWEN, JENNIFER WALKER ELROD and HAYNES, Circuit Judges:

OPINION

EMILIO M. GARZA, Circuit Judge

The issue presented to the en banc court is whether 18 U.S.C. § 2259 requires a district court to find that a defendant's criminal acts proximately caused a crime victim's losses before the district court may order restitution, even though that statute only

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[1] Judge Higginson is recused and did not participate in any aspect of this en banc rehearing.

contains a "proximate result" requirement in § 2259(b)(3)(F). All our sister circuits that have addressed this question have expanded the meaning of § 2259(b)(3)(F) to apply to all losses under § 2259(b)(3), thereby restricting the district court's award of restitution to a victim's losses that were proximately caused by a defendant's criminal acts. A panel of this court rejected that reading, and instead focused on § 2259's plain language to hold that § 2259 does not limit a victim's total recoverable losses to those proximately resulting from a defendant's conduct. A subsequent panel applied that holding to another appeal, yet simultaneously questioned it in a special concurrence that mirrored the reasoning of our sister circuits. To address the discrepancy between the holdings of this and other circuits, and to respond to the concerns of our court's special concurrence, we granted rehearing en banc and vacated the panel opinions.

This en banc court holds that § 2259 only imposes a proximate result requirement in § 2259(b)(3)(F); it does not require the Government to show proximate cause to trigger a defendant's restitution obligations for the categories of losses in § 2259(b)(3)(A)-(E). Instead, with respect to those categories, the plain language of the statute dictates that a district court must award restitution for the full amount of those losses. We VACATE the district courts' judgments in both of the cases below and REMAND for further proceedings consistent with this opinion.

I

We review a set of appeals arising from two separate criminal judgments issued by different district courts within this circuit. Both appeals involve restitution requests by Amy, a young adult whose uncle sexually abused her as a child, captured his acts on film, and then distributed them for others to see. The National Center for Missing and Exploited Children, which reports that it has found at least 35,000 images of Amy's abuse among the evidence in over 3,200 child pornography cases since 1998, describes the content of these images as "extremely graphic." The Government reports that restitution has been ordered for Amy in at least 174 child pornography cases across the United States in amounts ranging from $100 to $3,543,471.

A

In the consolidated cases *In re Amy,* 591 F.3d 792 (5th Cir.2009), and *In re Amy Unknown,* 636 F.3d 190 (5th Cir.2011), a panel of this court reviewed Amy's mandamus petition and appeal, both of which challenged the district court's order denying Amy restitution in connection with a criminal defendant's sentence.

In the case underlying Amy's mandamus petition and appeal, Doyle Paroline ("Paroline") pled guilty to 18 U.S.C. § 2252 for possessing 150 to 300 images of minors engaged in sexually explicit conduct. At least two images were of Amy. Pursuant to Amy's right to

restitution under the Crime Victims' Rights Act, 18 U.S.C. § 3771, the Government and Amy moved the district court to order restitution under § 2259. Amy supported this request with her psychiatrist's report, which itemized her future damages for specific categories of treatment and estimated total damages nearing $3.4 million.[2]

The district court denied Amy restitution. *United States v. Paroline*, 672 F.Supp.2d 781, 782 (E.D.Tex.2009). The district court held that § 2259 required the Government to prove that by possessing images depicting Amy's sexual abuse, Paroline proximately caused the injuries for which she sought restitution. *Id.* at 791. Concluding that the Government failed to show this causal link, the district court denied Amy restitution. *Id.* at 793. Amy petitioned for mandamus, asking this court to direct the district court to order Paroline to pay her the full amount of the restitution she had requested.

Over one dissent, that panel denied her relief because it was not clear or indisputable that § 2259 mandates restitution irrespective of proximate cause. *In re Amy*, 591 F.3d at 794-95. Amy sought rehearing and filed a separate notice of appeal from the district court's restitution order; her mandamus petition and

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[2] Amy attested that this amount reflects the total amount of her losses from the production, distribution, and possession of the images of her abuse and primarily comprises costs for future psychological care and future lost income.

appeal were consolidated. *See In re Amy Unknown*, 636 F.3d at 192-93. The panel assigned to hear Amy's appeal granted her rehearing request. *Id.* at 193. That panel then granted mandamus and rejected a requirement of proof of proximate cause in § 2259 because "[i]ncorporating a proximate causation requirement where none exists is a clear and indisputable error," but declined to reach the question of whether crime victims such as Amy have a right to an appeal. *Id.* at 193, 201. The panel remanded for the district court's entry of a restitution order. *Id.* at 201.

B

In *United States v. Wright*, 639 F.3d 679 (5th Cir.2011), a separate panel of this court heard the appeal of Michael Wright ("Wright"). Like Paroline, Wright pled guilty to 18 U.S.C. § 2252 for possession of over 30,000 images of child pornography, which included images of Amy's abuse.[3]

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[3] Wright pled guilty pursuant to a plea agreement in which he generally waived his right to appeal but reserved his right to appeal "any punishment in excess of the statutory maximum." Wright's plea agreement stated that "the restitution provisions of Sections 3663 and 3663A of Title 18, United States Code will apply" and made no reference to § 2259. During the guilty plea colloquy, the district court restated the terms of the plea agreement regarding Wright's appeal waiver. The district court asked Wright if he understood all the rights he was waiving, and he responded that he did. The district court also asked Wright if he understood that he "also may be required to reimburse any victim for the amount of his or her loss under the Victim

(Continued on following page)

The Government sought restitution for Amy under § 2259, supporting its request with the same psychiatric report Amy provided in Paroline's case. The district court awarded Amy $529,661 in restitution, explaining that "[t]his amount was reached by adding the estimated costs of the victim's future treatment and counseling at $512,681.00 and the costs of the victim's expert witness fees at $16,980.00." Judgment at 6-7, *United States v. Wright,* No. 09-CR-103 (E.D.La. Dec. 16, 2009). The district court did not explain why it awarded no restitution for the other amounts that Amy had requested and made no reference to a proximate cause requirement. *See id.* Observing that Amy had

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Restitution Law, if that term is applicable." Wright again said he understood.

The Government seeks to assert the appeal waiver Wright signed only if we hold that restitution is limited by proximate cause in all respects. It concedes, however, that Wright's appeal waiver would not be valid if the en banc court holds that § 2259 lacks a proximate cause requirement that covers all categories of losses because Wright did not waive his right to appeal a sentence unbounded by a proximate cause limitation. Because we hold today that § 2259's isolated "proximate result" language does not cloak all categories of losses with a proximate cause requirement, we need not further address the appeal waiver issue. We have repeatedly held that appeal waivers the Government does not seek to enforce are not self-enforcing and that the Government can effectively "waive the waiver." *See United States v. Acquaye,* 452 F.3d 380, 381 (5th Cir.2006). Given the Government's concession and our holding on the substance of § 2259, we conclude that the Government is not seeking to enforce the appeal waiver in this case. Accordingly, we conclude that the appeal waiver does not bar Wright's appeal. *See id.*

been awarded restitution in another district court, the district court further explained that "[t]he restitution ordered herein is concurrent with any other restitution order either already imposed or to be imposed in the future payable to this victim." USCA5 R. 111-12. Wright appealed to contest the restitution order.

The *Wright* panel first found that the appeal waiver in Wright's plea agreement did not foreclose his right to appeal the restitution order. *Wright*, 639 F.3d at 683. Then, applying *Amy*'s holding, the Wright panel concluded that Amy was entitled to restitution but that the district court had given inadequate reasons for the award it assessed. *Id.* at 685-86. The panel remanded for further findings regarding the amount of the award. *Id.* at 686. The three members on the *Wright* panel, however, joined a special concurrence that questioned *Amy*'s holding and suggested that the court rehear both cases en banc, in part because this court was the first circuit to hold that a proximate cause requirement does not attach to the "full amount of . . . losses" under § 2259(b)(3). *See id.* at 689-90, 692 (Davis, J., specially concurring).

This court held the mandates in both *Amy* and *Wright*. A majority of this court's members voted to rehear these opinions en banc to resolve the question of how to award restitution under § 2259 and to address other related questions raised by these appeals. *See In re Amy Unknown & United States v. Wright*, 668 F.3d 776 (5th Cir.2012) (granting rehearing en banc).

II

In rehearing *Amy* and *Wright* en banc, we address the following issues: (1) whether the Crime Victims' Rights Act ("CVRA") grants crime victims a right to an appeal or, if not, whether this court should review Amy's mandamus petition under the standard this court has applied to supervisory writs; (2) whether 18 U.S.C. § 2259 requires the Government to show a defendant's criminal acts proximately caused a victim's injuries before a district court may award restitution; and (3) whether, in light of our holding with respect to § 2259, the district courts in *Amy* and *Wright* erred.

A

Amy petitioned for mandamus and, after this court initially denied her relief, appealed from the district court's restitution order. In the panel opinion in *Amy*, this court granted her mandamus on rehearing under our traditional mandamus inquiry, which this court held in *In re Dean,* 527 F.3d 391, 394 (5th Cir.2008) (per curiam), applies to appeals under the CVRA. *See Amy,* 636 F.3d at 197-98. In *Amy*, the panel declined to decide whether the CVRA entitled her to bring a direct appeal, *see id.* at 194-97, even though *Dean* seemingly foreclosed that argument. *See Dean,* 527 F.3d at 394 (rejecting victims' assertion that the standards governing an appeal apply on CVRA review). Amy asks the en banc court to construe the CVRA to guarantee crime victims the right

of appeal and alternatively asks the court to hear her mandamus petition under our supervisory mandamus power, which would hold her mandamus petition to a less onerous standard of review than *Dean* requires.

1

The CVRA grants crime victims, including Amy, "[t]he right to full and timely restitution as provided in law," 18 U.S.C. § 3771(a)(6), and makes explicit that crime victims, their representatives, and the Government may move the district court to enforce that right. *Id.* § 3771(d)(1); *see id.* § 3771(e) (defining "crime victim" as "a person directly and proximately harmed as a result of the commission of a Federal offense."). The CVRA further commands that "[i]n any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded [this right]." *Id.* § 3771(b)(1). Where a district court denies a victim relief, the CVRA provides that

> [T]he movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed.

Id. § 3771(d)(3); *see id.* § 3771(d)(5)(B) (requiring the victim to petition for mandamus within fourteen days). The CVRA further grants the Government,

"[i]n any appeal in a criminal case," the authority to "assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates," *id.* § 3771(d)(4), and makes clear that "[n]othing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." *Id.* § 3771(d)(6).

Amy's argument effectively requires us to address two questions: first, whether the CVRA entitles crime victims to an appeal; and second, whether the CVRA entitles crime victims' mandamus petitions through the review standards governing an appeal. First, we observe that the plain text of the CVRA expressly grants crime victims only a right to mandamus relief and makes no mention of any right of crime victims to an appeal. *See* 18 U.S.C. § 3771(d)(3); *Dean,* 527 F.3d at 394. In contrast, the CVRA grants the Government the right to mandamus while also retaining the Government's right to a direct appeal. *Id.* § 3771(d)(4) (allowing only the Government to "assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates."). In interpreting the statute, absent contrary indication, we presume that Congress "legislated against the background of our traditional legal concepts," *United States v. U.S. Gypsum Co.,* 438 U.S. 422, 437, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978), including that crime victims have no right to appeal. *See Marino v. Ortiz,* 484 U.S. 301, 304, 108 S.Ct. 586, 98 L.Ed.2d 629 (1988) (citing *United States ex rel. Louisiana v. Jack,* 244 U.S. 397, 402, 37 S.Ct. 605, 61

L.Ed. 1222 (1917)) (explaining that "[t]he rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment.").

Amy fails to show any language in the statute that reflects Congress' intent to depart from this principle. Instead, she protests that before the CVRA's enactment, this court heard appeals from nonparties with a direct interest in aspects of criminal prosecutions and contends that this suggests that the crime victims retain a similar right to appeal under the CVRA. *See Amy,* 636 F.3d at 195-96 (discussing *United States v. Briggs,* 514 F.2d 794 (5th Cir.1975); *United States v. Chagra,* 701 F.2d 354 (5th Cir.1983)). The cases Amy cites, however, are unconvincing. They allowed non-parties to appeal discrete pre-trial issues with constitutional implications, which were unrelated to the merits of the criminal cases from which they arose. *See Briggs,* 514 F.2d at 799 (holding that persons named as unindicted co-conspirators in an indictment had standing to challenge the power of a grand jury to charge them with criminal conduct without indicting them); *Chagra,* 701 F.2d at 360 (allowing newspapers and a reporter to appeal an order restricting their access to a pretrial bail reduction hearing). These cases do not stand for the proposition that this court has allowed victims any post-judgment right of appeal and, moreover, do not support the inference that Congress drafted the CVRA with the understanding that crime victims had any right to an appeal. Because nothing in the CVRA suggests that Congress intended to grant crime

victims the right to an appeal or otherwise vary the historical rule that crime victims do not have the right of appeal, we conclude that the CVRA grants crime victims only mandamus review.[4]

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[4] Six of our sister circuits generally favor a reading of the statute that allows no appeal, and no circuit has expressly granted victims the right to an appeal under the CVRA. *See United States v. Alcatel-Lucent France, SA*, 688 F.3d 1301, 1307 (11th Cir.2012); *United States v. Monzel*, 641 F.3d 528, 533 (D.C.Cir.), *cert. denied, Amy, Victim in Misty Child Pornography Series v. Monzel*, ___ U.S. ___, 132 S.Ct. 756, 181 L.Ed.2d 508 (2011); *United States v. Aguirre-Gonzalez*, 597 F.3d 46, 53-56 (1st Cir.2010); *In re Antrobus*, 519 F.3d 1123, 1128-30 (10th Cir.2008); *Kenna v. U.S. Dist. Court*, 435 F.3d 1011, 1017 (9th Cir.2006); *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555, 562-63 (2d Cir.2005); *see also In re Acker*, 596 F.3d 370, 373 (6th Cir.2010) ("[W]here the [purported victim's] direct appeal was filed at the same time as the [CVRA] mandamus petition and raises the identical issues, there is no additional right of appeal.").

Further supporting this conclusion is that under the Victim and Witness Protection Act ("VWPA"), the CVRA's predecessor in which restitution was optional rather than mandatory, at least one circuit court denied victims a right to any relief because "[n]owhere in the statute does Congress suggest that the VWPA was intended to provide victims with a private remedy to sue or appeal restitution decisions." *United States v. Mindel*, 80 F.3d 394, 397 (9th Cir.1996). This same logic extends to limit the right of crime victims under the CVRA to only the mandamus relief that the statute clearly expresses. *See id.*

The cases Amy relies on, moreover, further disfavor allowing a § 1291 appeal. Any persuasive force that *In re Siler*, 571 F.3d 604, 608 (6th Cir.2009) (allowing crime victims to appeal under § 1291 when they sought the use of a presentencing report in a subsequent civil suit), may have is undercut by the Sixth's Circuit later decision not to extend a right of appeal to a crime

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Next, we consider whether the CVRA nonetheless requires appellate courts to apply the standard of review governing a direct criminal appeal to mandamus petitions, and conclude it does not. When assessing the meaning of the term "mandamus" in the CVRA, we presume that this "statutory term . . . ha[s] its common-law meaning," absent contrary indication. *Taylor v. United States,* 495 U.S. 575, 592, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990). The Supreme Court has explained that "[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Kerr v. U.S. Dist. Court,* 426 U.S. 394, 402, 96 S.Ct. 2119, 48 L.Ed.2d 725 (1976); *accord Cheney v. U.S. Dist. Court,* 542 U.S. 367, 380, 124 S.Ct. 2576, 159 L.Ed.2d 459 (2004). "[T]he writ has traditionally been used in the federal courts only . . . to compel it to exercise its authority when it is its duty to do so." *Kerr,* 426 U.S. at 402, 96 S.Ct. 2119 (quotation marks omitted). "[O]nly exceptional circumstances amounting to a judicial usurpation of power will justify the invocation of this extraordinary remedy." *Id.* (quotation marks omitted). Mandamus traditionally "is not to be used as a substitute for an appeal, or to control the decision of the trial court in discretionary matters." *Plekowski v. Ralston-Purina*

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victim who simultaneously petitioned for mandamus relief. *See In re Acker,* 596 F.3d 370, 373 (6th Cir.2010). Likewise, the Third Circuit's decision allowing a crime victim a § 1291 appeal, without any analysis, in *United States v. Kones,* 77 F.3d 66, 68 (3d Cir.1996), also fails to convince us that allowing crime victims a § 1291 appeal is proper.

Co., 557 F.2d 1218, 1220 (5th Cir.1977). Issuance of the writ is largely a matter of discretion with the court to which the petition is addressed. *See Schlagenhauf v. Holder,* 379 U.S. 104, 112 n. 8, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964).

Certain aspects of the CVRA convince us that Congress intended mandamus in its traditional sense when it selected the word "mandamus." *See Taylor,* 495 U.S. at 592, 110 S.Ct. 2143. Reading the statute's provisions together, the CVRA seems to intentionally limit victims' right to review as an extraordinary remedy because it authorizes review only where a district court fails to fulfill a statutory duty; the statute does not extend victims' right to review to situations where a district court acts on a discretionary matter. *See Kerr,* 426 U.S. at 402, 96 S.Ct. 2119. To explain, the CVRA lists eight rights that it ensures crime victims, including the right to restitution. 18 U.S.C. § 3771(a)(1)-(8). The restrictive statement, "A crime victim has the following rights," precedes the list of those rights and supports the conclusion that the CVRA's grant of rights is exclusive. *Id.* § 3771(a). And only where the district court denies a motion seeking to assert one of those rights does the CVRA allow a victim to seek the review of an appellate court. *See id.* § 3771(d)(3). This limitation suggests that in granting relief, the district court retains discretion to select the appropriate means to ensure victims' rights, and that victims may only properly seek appellate intervention where the district court clearly fails to "exercise its authority when it is its

duty to do so." *See Kerr,* 426 U.S. at 402, 96 S.Ct. 2119; *see also Plekowski,* 557 F.2d at 1220 ("The remedy of mandamus . . . is not to be used . . . to control the decision of the trial court in discretionary matters."). Under this reading, only the Government would retain a right to appeal even seemingly discretionary actions, *see* 18 U.S.C. § 3771(d)(4), and could elect to appeal the district court's order to the extent it exercises its own prosecutorial discretion to do so. *See id.* § 3771(d)(6). If we were to instead read the CVRA as extending a right of appeal to victims, we would expand the rights granted to crime victims and simultaneously erode the CVRA's attempt to preserve the Government's discretion. *See id.* A reading of the statute that limits victims' appellate review to the traditional mandamus inquiry thus respects both the CVRA's preservation of the Government's and the district court's traditional discretion while safeguarding the limited rights the CVRA grants.

The very short timeline in which appellate courts must act, and the fact that a single circuit judge may rule on a petition, confirm the conclusion that Congress intended to limit crime victims' appellate relief under the CVRA to traditional mandamus review. *See* 18 U.S.C. § 3771(d)(3). These requirements reflect that appellate courts must grant relief quickly, but rarely, as "a drastic remedy generally reserved for really 'extraordinary' cases." *In re E.E.O.C.,* 709 F.2d 392, 394 (5th Cir.1983) (citing *Kerr,* 426 U.S. at 402, 96 S.Ct. 2119).

Amy has failed to show that Congress intended to grant crime victims anything other than traditional mandamus relief under the CVRA.[5] While, as Amy

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[5] Amy nevertheless insists that the CVRA's requirements that the courts of appeals "take up and decide" a petition and "ensure that the crime victim is afforded" all his or her rights in a court proceeding support recognizing victims' right to an appeal and disfavor an interpretation that would provide for traditional mandamus review, which is typically discretionary. *See* 18 U.S.C. § 3771(b)(1), (d)(3). The requirement that appellate courts "take up and decide" a petition, however, relates directly to the short time period in which Congress directs appellate courts to act; this short time period, as we have already explained, favors, rather than opposes, the use of mandamus. *See supra*. Similarly, Amy fails to note that the command that federal courts "ensure that the crime victim is afforded" certain rights falls within a section labeled "In general." *See id.* § 3771(b)(1). Placed in context, this language merely reflects Congress' intention to make plain that federal courts must guard the specific, but necessarily limited, rights spelled out in the CVRA through the processes prescribed in its other subsections. This language does not suggest that the grant of mandamus in this context is not discretionary. Amy's arguments are unavailing.

Only two circuits support Amy's position that she is entitled to something more closely resembling direct appellate standards of review. With little analysis, the Second Circuit has concluded an abuse of discretion standard should govern CVRA mandamus petitions. *See In re W.R. Huff*, 409 F.3d at 562-63. That court divined a relaxed standard from the express terms of the statute and reasoned only that "[i]t is clear . . . that a petitioner seeking relief pursuant to the mandamus provision set forth in § 3771(d)(3) need not overcome the hurdles typically faced by a petitioner seeking review of a district court determination through a writ of mandamus." *Id.* at 562-63. The lack of reasoning accompanying the Second Circuit's use of a relaxed standard of review fails

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insists, it may be more difficult for a crime victim to enforce rights through mandamus than appeal, this limitation reflects the express language of the statute and honors the common law tradition in place when the CVRA was drafted.

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to convince us that anything other than traditional mandamus standards should govern our review of CVRA petitions.

The Ninth Circuit also has provided for relaxed review, focusing on legal error in reviewing a crime victim's mandamus petition under the CVRA. To justify this relaxed review, the Ninth Circuit emphasized that "[t]he CVRA explicitly gives victims aggrieved by a district court's order the right to petition for review by writ of mandamus, provides for expedited review of such a petition, allows a single judge to make a decision thereon, and requires a reasoned decision in case the writ is denied." *Kenna*, 435 F.3d at 1017. But a later decision suggests that the Ninth Circuit's interpretation in *Kenna* was influenced by the facts of that case and a desire to reach a question of law that its traditional mandamus inquiry would not have allowed; in that later case, the Ninth Circuit explained that it applies its normal test to CVRA mandamus petitions, and merely emphasizes the question of legal error in assessing a crime victim's right to relief. *See In re Andrich*, 668 F.3d 1050, 1051 (9th Cir.2011) (per curiam).

While Amy asserts that two additional circuits favor her position, those courts have not clearly accepted her position, and it is unclear that they would do so if presented with the opportunity to fully analyze the legal issues this question presents. *See In re Stewart*, 552 F.3d 1285 (11th Cir.2008) (granting mandamus on question of whether a person was a crime victim who could participate in district court proceedings without reviewing traditional mandamus factors); *In re Walsh*, 229 Fed.Appx. 58, 60-61 (3d Cir.2007) (in dicta, agreeing with the Second and Ninth Circuits that "mandamus relief is available under a different, and less demanding, standard under 18 U.S.C. § 3771 in the appropriate circumstances.").

2

Our conclusion that the CVRA does not provide crime victims with appellate review does not foreclose Amy's somewhat different request that we apply our supervisory mandamus power of review to her mandamus petition, which would lower the hurdles to relief under mandamus. *See In re McBryde,* 117 F.3d 208, 223 (5th Cir.1997) (acknowledging that "courts of appeals have possessed the power to issue supervisory writs of mandamus in order to prevent practices posing severe threats to the proper functioning of the judicial process"); *In re E.E.O.C.,* 709 F.2d at 395 (in allowing a supervisory writ to proceed as a one-time-only device, this court advised it would only grant the writ if "there is 'usurpation of judicial power' or a clear abuse of discretion" and the movant showed it had a clear and indisputable right to a writ) (quoting *Schlagenhauf,* 379 U.S. at 110, 85 S.Ct. 234). Even so, we need not resolve this question. Our traditional inquiry suffices to afford Amy the relief she requests. *See* IV-A *infra. Cf. Aguirre-Gonzalez,* 597 F.3d at 53-56 (declining to settle question of standard of review because neither the traditional mandamus standard nor a more relaxed standard would afford relief in the circumstances of that case).

Because we hold that the CVRA entitles Amy to only mandamus relief, we dismiss her appeal. Under our traditional mandamus inquiry, we will grant Amy's requested mandamus only if (1) she has no other adequate means to attain the desired relief; (2) she has demonstrated a clear and indisputable right

to the issuance of a writ; and (3) in the exercise of our discretion, we are satisfied that the writ is appropriate. *See Dean,* 527 F.3d at 394.

B

Wright appeals from the district court's restitution order. This court reviews the legality of the restitution order de novo. *United States v. Arledge,* 553 F.3d 881, 897 (5th Cir.2008). If the restitution order is legally permitted, we then review the amount of the order for an abuse of discretion. *Id.; United States v. Ollison,* 555 F.3d 152, 164 (5th Cir.2009).

III

To resolve Amy's mandamus petition and Wright's appeal, we must first ascertain the level of proof required to award restitution to Amy and crime victims like her under 18 U.S.C. § 2259. The parties' dispute turns on the interpretation and effect of the words "proximate result" in § 2259(b)(3)(F).

A

Our analysis again begins with the text of the statute. *See Watt,* 451 U.S. at 265, 101 S.Ct. 1673; *In re Rogers,* 513 F.3d 212, 225 (5th Cir.2008). If § 2259's language is plain, our "sole function" is to "enforce it according to its terms" so long as "the disposition required by the text is not absurd." *Lamie v. U.S. Trustee,* 540 U.S. 526, 534, 124 S.Ct. 1023, 157

L.Ed.2d 1024 (2004) (internal quotation marks omitted); *see also Bates v. United States,* 522 U.S. 23, 29, 118 S.Ct. 285, 139 L.Ed.2d 215 (1997) (holding that courts "ordinarily" should "resist reading words or elements into a statute that do not appear on its face."). The Supreme Court has explained that "[s]tatutory construction 'is a holistic endeavor.'" *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.,* 508 U.S. 439, 455, 113 S.Ct. 2173, 124 L.Ed.2d 402 (1993) (quoting *United Savings Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.,* 484 U.S. 365, 371, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988)). "This Court naturally does not review congressional enactments as a panel of grammarians; but neither do we regard ordinary principles of English prose as irrelevant to a construction of those enactments." *Flora v. United States,* 362 U.S. 145, 150, 80 S.Ct. 630, 4 L.Ed.2d 623 (1960). Although "the meaning of a statute will typically heed the commands of its punctuation[,] . . . a purported plain-meaning analysis based only on punctuation is necessarily incomplete." *Bank of Or.,* 508 U.S. at 454, 113 S.Ct. 2173. "[A]t a minimum," our analysis "must account for a statute's full text, language as well as punctuation, structure, and subject matter." *Id.* at 455, 113 S.Ct. 2173.

Only after we apply principles of statutory construction, including the canons of construction, and conclude that the statute is ambiguous, may we consult legislative history. *Carrieri v. Jobs.com, Inc.,* 393 F.3d 508, 518-19 (5th Cir.2004). For statutory language to be ambiguous, however, it must be

susceptible to more than one reasonable interpretation or more than one accepted meaning. *Id.* at 519. Where "the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Conn. Nat'l Bank v. Germain,* 503 U.S. 249, 254, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992) (quoting *Rubin v. United States,* 449 U.S. 424, 430, 101 S.Ct. 698, 66 L.Ed.2d 633 (1981)).

The language of 18 U.S.C. § 2259 reflects a broad restitutionary purpose. *See United States v. Laney,* 189 F.3d 954, 966 (9th Cir.1999) ("Section 2259 is phrased in generous terms, in order to compensate the victims of sexual abuse for the care required to address the long term effects of their abuse."); *United States v. Crandon,* 173 F.3d 122, 126 (3d Cir.1999) ("Congress [in § 2259] mandated broad restitution for a minor victim."). Section 2259(a) mandates that district courts "shall order restitution for any offense under this chapter," including the offense to which Paroline and Wright pled guilty, 18 U.S.C. § 2252. Section 2259(b)(1) specifies that a restitution order "shall direct the defendant to pay the victim . . . the full amount of the victim's losses."[6]

Section 2259(b)(3) defines the term "the full amount of the victim's losses," contained in § 2259(b)(1), as

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[6] A "victim" is an "individual harmed as a result of a commission of a crime under this chapter." *Id.* § 2259(c).

> [A]ny costs incurred by the victim for –
>
> (A) medical services relating to physical, psychiatric, or psychological care;
>
> (B) physical and occupational therapy or rehabilitation;
>
> (C) necessary transportation, temporary housing, and child care expenses;
>
> (D) lost income;
>
> (E) attorneys' fees, as well as other costs incurred; and
>
> (F) any other losses suffered by the victim as a proximate result of the offense.

Section 2259(b)(4) reinforces that "[t]he issuance of a restitution order under this section is mandatory," *id.* § 2259(b)(4)(A), and instructs that "[a] court may not decline to issue an order under this section because of – (i) the economic circumstances of the defendant; or (ii) the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source." *Id.* § 2259(b)(4)(B). To guide the district courts in awarding restitution, § 2259(b)(2) instructs courts to issue and enforce restitution orders "in accordance with section 3664 and in the same manner as an order under 3663A."

B

The district court in *Paroline* rejected Amy's argument that § 2259 requires an award of "the full

amount of [her] losses." Instead, resorting to the Supreme Court's decision in *Porto Rico Railway, Light & Power Co. v. Mor*, 253 U.S. 345, 348, 40 S.Ct. 516, 64 L.Ed. 944 (1920), which explained that "[w]hen several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all," the district court extended the "proximate result" language contained in § 2259(b)(3)(F) to apply to the losses described in subsections (A) through (E). *See Paroline*, 672 F.Supp.2d at 788 (also citing *Fed. Mar. Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 734, 93 S.Ct. 1773, 36 L.Ed.2d 620 (1973)). In construing the statute, the district court expressed its concern that "a restitution order under section 2259 that is not limited to losses proximately caused by the defendant's conduct would under most facts, including these, violate the Eighth Amendment," *id.* at 789, and that an alternative "interpretation would be plainly inconsistent with how the principles of restitution and causation have historically been applied." *Id.* at 790. In reversing the district court's holding, the *Amy* panel rejected a generalized proximate cause requirement and stressed that the causation requirement in the definition of "victim," together with § 3664's mechanism for joint and several liability, surmounts any Eighth Amendment concerns. *See Amy*, 636 F.3d at 200-01.

Unlike the district court in *Paroline*, the *Wright* district court seemed to accept Amy's argument to a

limited degree, as it awarded all of the restitution she requested for her future treatment and counseling, and the costs of her expert witness fees. Although the *Wright* panel accepted *Amy*'s holding as binding precedent in reviewing the district court's restitution award, *Wright*'s special concurrence, tracing the reasoning of the district court in *Amy* and challenging the panel's decision not to limit § 2259 to damages proximately caused by a defendant's criminal actions, presaged this en banc rehearing. *See Wright*, 639 F.3d at 686-89 (Davis, J., specially concurring).

In this en banc rehearing, Amy maintains that § 2259 is a mandatory statute requiring district courts to award full restitution to victims of child pornography. In her view, the plain language of the statute dictates that the proximate result language in § 2259(b)(3)(F) is limited to that category of losses and does not apply to the categories of losses described in § 2259(b)(3)(A)-(E).

The Government contends that § 2259(b)(3) conditions all of a victim's recoverable losses on a showing that those losses proximately resulted from the offense. Drawing on *Porto Rico Railway*, the Government asserts that the statutory text reflects Congress' intent to condition all recoverable losses on a showing of proximate cause. Without citing to precedent, the Government urges us "to presume that Congress adhered to the usual balance in the law of remedies: to hold defendants fully accountable for the losses associated with their conduct but in a manner that respects the deeply-rooted principle of proximate

causation." The Government further asserts that there is nothing absurd in the conclusion that Congress intended this limiting principle to apply to all categories of losses. Invoking a recent Supreme Court case analyzing civil tort liability under the Federal Employers' Liability Act in support of this proposition, the Government reasons that "the very purpose of a proximate-cause limitation is to prevent infinite liability." *See CSX Transp., Inc. v. McBride*, ___ U.S. ___, 131 S.Ct. 2630, 2642, 180 L.Ed.2d 637 (2011). The Government advises the court not to delve into legislative materials and also stresses that seven circuits have rejected Amy's reading of the statute.

Paroline similarly construes the "proximate result" language in the statute and relies on the construction of other restitution statutes to support his position. Both Paroline and Wright draw on legislative materials to assert that in drafting § 2259, Congress intended to incorporate a proximate cause requirement.[7]

C

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Our plain reading of § 2259 leads us to the following conclusion: Once a district court determines

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[7] Of course, we cannot consult these materials unless we conclude that § 2259's text is ambiguous. *See Carrieri*, 393 F.3d at 518-19. Even if we were to consult these materials, they are inconclusive at best.

that a person is a victim, that is, an "individual harmed as a result of a commission of a crime" under the chapter that relates to the sexual exploitation and abuse of children, § 2259 requires the district court to order restitution for that victim. *See* 18 U.S.C. § 2259(a), (b)(4)(A), (c). The restitution order that follows must encompass "the full amount of the victim's losses." *Id.* § 2259(b)(1). Those losses include five categories of specific losses – medical services related to physical, psychiatric, or psychological care; physical and occupational therapy or rehabilitation; necessary transportation, temporary housing, and childcare expenses; lost income; and attorney's fees and costs – and one category of "other losses suffered by the victim as a proximate result of the offense." *Id.* § 2259(b)(3). The rule of the last antecedent, recently applied by the Supreme Court in *Barnhart v. Thomas,* 540 U.S. 20, 26, 124 S.Ct. 376, 157 L.Ed.2d 333 (2003), instructs that "a limiting clause or phrase," such as the "proximate result" phrase in § 2259(b)(3)(F), "should ordinarily be read as modifying only the noun or phrase that it immediately follows." "[T]his rule is not an absolute and can assuredly be overcome by other indicia of meaning," but "construing a statute in accord with the rule is 'quite sensible as a matter of grammar.'" *Id.* (quoting *Nobelman v. Am. Sav. Bank,* 508 U.S. 324, 330, 113 S.Ct. 2106, 124 L.Ed.2d 228 (1993)); *accord* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 144 (2012) ("This rule is the legal expression of a commonsense principle of grammar").

The structure and language of § 2259(b)(3) limit the phrase "suffered by the victim as a proximate result of the offense" in § 2259(b)(3)(F) to the miscellaneous "other losses" contained in that subsection. We see no "other indicia of meaning" in the statute to suggest that the rule of the last antecedent does not apply here. *See id.* Despite the clear terms of the statute, other courts and the parties before us raise arguments in favor of a generalized proximate cause requirement based on (a) canons of statutory construction, (b) traditional causation principles, and (c) possible absurd results. We address – and dismiss – each in turn.

a

First, the Government, Paroline, Wright, and Judge Davis's dissenting opinion press the importance of *Porto Rico Railway* and other caselaw relied on by the district court. As did the *Amy* panel, however, we doubt *Porto Rico Railway*'s applicability here. *Porto Rico Railway* concerned the following statute: "Said District Court shall have jurisdiction of all controversies where all of the parties on either side of the controversy are citizens or subjects of a foreign state or states, or citizens of a state, territory, or district of the United States not domiciled in Porto Rico. . . ." *Porto Rico Ry.*, 253 U.S. at 346, 40 S.Ct. 516. The Supreme Court read the words, "not domiciled in Porto Rico," to apply equally to "citizens or subjects of a foreign state or states" and "citizens of a state, territory, or district of the United States." *Id.* at

348, 40 S.Ct. 516. The Supreme Court explained, "When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." *Id.* at 348, 40 S.Ct. 516.

Deprived of its context, *Porto Rico Railway*'s rule can be contorted to support the statutory interpretation urged by the Government and apply the "proximate result" language in § 2259(b)(3)(F) to the five categories of loss that precede it. But applying that rule here to require generalized proximate cause would disregard that the list in *Porto Rico Railway*'s statute is significantly different than the one central to this appeal. The statute analyzed in *Porto Rico Railway* featured a long sentence, unbroken by numbers, letters, or bullets, with two complex noun phrases sandwiching the conjunction "or," with the modifier "domiciled in Porto Rico" following the conjoined phrases. The structure of the sentence required the reading the Supreme Court gave it; the phrase "domiciled in Porto Rico" modified the nouns at the head of the two phrases, "citizens or subjects" and "citizens." The Supreme Court expressed its concern that a different construction would have left the reader with a fragmented phrase, which would be overly broad in application, and which, in turn, would have failed to satisfy the statute's overarching purpose to curtail federal courts' jurisdiction. *See Porto Rico Ry.*, 253 U.S. at 348, 40 S.Ct. 516.

Section 2259, in contrast, begins with an introductory phrase composed of a noun and verb ("'full amount of the victim's losses' includes any costs incurred by the victim for – ") that feeds into a list of six items, each of which are independent objects that complete the phrase. Only the last of these items contains the limiting language "proximate result." A double-dash opens the list, and semi-colons separate each of its elements, leaving § 2259(b)(3) with a divided grammatical structure that does not resemble the statute in *Porto Rico Railway,* with its flowing sentence that lacks any distinct separations. Of course, we do not sit "as a panel of grammarians," *Flora,* 362 U.S. at 150, 80 S.Ct. 630, but we cannot ignore that "the meaning of a statute will typically heed the commands of its punctuation." *Bank of Or.,* 508 U.S. at 454, 113 S.Ct. 2173. The structural and grammatical differences between § 2259 and the statute in *Porto Rico Railway* forcefully counsel against applying *Porto Rico Railway* to the current statute to reach the *Paroline* district court's reading.[8]

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[8] Further, *Porto Rico Railway* also commands that where the statute in question "manifests a general purpose . . . [and] the application of the clause were doubtful, we should so construe the provision as to effectuate the general purpose of Congress." 253 U.S. at 348, 40 S.Ct. 516. The grammar of § 2259, viewed in light of § 2259's broad restitutionary purpose as expressed by its plain terms, confirms that our reading is correct. *See Crandon,* 173 F.3d at 126 ("Congress [in § 2259] mandated broad restitution for a minor victim."); *Laney,* 189 F.3d at 966 ("Section 2259 is phrased in generous terms, in order

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Seatrain, the other case relied on by the district court, is similarly inapplicable. *See Seatrain,* 411 U.S. at 726, 93 S.Ct. 1773. *Seatrain* analyzed a federal antitrust statute that included a seven-category list. *Id.* at 732, 93 S.Ct. 1773. All items on the list but the third referred to ongoing activity; the seventh category was a catchall category phrased as "or in any manner providing for an exclusive, preferential, or cooperative working arrangement." *Id.* at 732-33, 93 S.Ct. 1773. The Government urged the Supreme Court to construe this third category as concerning a one-time activity. *Id.* at 732, 93 S.Ct. 1773. The Court rejected that argument because a broad reading of the statute would conflict with the legal principle that antitrust laws are strictly construed. *Id.* at 733, 93 S.Ct. 1773. To aid in a narrow construction of the statute, the Court applied the rule of statutory construction that "[catchall] clauses are to be read as bringing within a statute categories similar in type to those specifically enumerated" and concluded that the last catchall phrase indicated that Congress intended all the activities to penalize only ongoing antitrust activities. *Id.* at 734, 93 S.Ct. 1773 (citing 2 J. SUTHERLAND, STATUTES & STATUTORY CONSTRUCTION § 4908 *et seq.* (3d ed.1943)). Here, we do not face a statutory scheme that requires narrow construction. *See Crandon,* 173 F.3d at 126; *Laney,*

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to compensate the victims of sexual abuse for the care required to address the long term effects of their abuse.").

189 F.3d at 966. *Seatrain*'s weight in interpreting § 2259 is questionable at best.

Seatrain's rule is at odds with the rule of last antecedent on which we rely; the rule of last antecedent, moreover, provides a reading faithful to § 2259's broad restitutionary purpose. To illustrate, in *Barnhart v. Thomas,* the Supreme Court reviewed an agency's interpretation of a statute that states

> An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do *his previous work* but cannot, considering his age, education, and work experience, engage in *any other kind of substantial gainful work* which exists in the national economy.

Barnhart, 540 U.S. at 23, 124 S.Ct. 376 (emphases added). Applying the rule of the last antecedent, the Supreme Court held that the words "which exists in the national economy" referred only to the noun "any other kind of substantial gainful work" and not to the noun "his previous work." *Id.* at 24-27, 124 S.Ct. 376. In support of this holding, the Supreme Court reasoned that the words "any other" in the second phrase did not show the "contrary intention" necessary to overcome the rule of the last antecedent to apply that phrase to the first. *Id.* at 27-28, 124 S.Ct. 376.

The Supreme Court also applied the rule of last antecedent in *Jama v. Immigration & Customs Enforcement,* 543 U.S. 335, 125 S.Ct. 694, 160

L.Ed.2d 708 (2005) to a statute that included a complete sentence that fed into a seven-category list. Each category on the list was punctuated with a period; only the last category on the list contained a limiting clause. *Id.* at 340, 125 S.Ct. 694. Drawing on the grammatical structure of the list, the Supreme Court concluded that applying the limiting clause to the other items in the list "stretches the modifier too far."[9] *Id.* at 343, 125 S.Ct. 694.

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[9] In *Barnhart*, Justice Scalia provided an example of application of this rule in ordinary life that reveals the commonsensical aspect of the error in applying the proximate result language of § 2259(b)(3)(F) to the five categories of losses that precede it:

> Consider, for example, the case of parents who, before leaving their teenage son alone in the house for the weekend, warn him, "You will be punished if you throw a party or engage in any other activity that damages the house." If the son nevertheless throws a party and is caught, he should hardly be able to avoid punishment by arguing that the house was not damaged. The parents proscribed (1) a party, and (2) any other activity that damages the house. As far as appears from what they said, their reasons for prohibiting the home-alone party may have had nothing to do with damage to the house – for instance, the risk that underage drinking or sexual activity would occur. And even if their only concern was to prevent damage, it does not follow from the fact that the same interest underlay both the specific and the general prohibition that proof of impairment of that interest is required for both. The parents, foreseeing that assessment of whether an activity had in fact "damaged" the house could be disputed by their son, might have wished to preclude all argument by specifying and categorically

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As we have already explained, the grammatical structure of § 2259(b)(3) reflects the intent to read each category of loss separate from the one that preceded it and limit the application of the "proximate result" language in § 2259(b)(3)(F). Comparing the Supreme Court's more recent articulations of the rule of the last antecedent in *Barnhart* and *Jama* to the older rules of statutory construction expressed in *Porto Rico Railway* and *Seatrain* confirms that application of the rule of the last antecedent to limit the proximate result language to the subsection in which it is contained makes more sense here. *See id.* at 26, 124 S.Ct. 376. Applying the proximate result language of § 2259(b)(3)(F) to the categories that precede it would "stretch [ ] the modifier too far" and disregard the structure of § 2259(b)(3) as written. *Jama*, 543 U.S. at 343, 125 S.Ct. 694.

At least three circuits agree that under rules of statutory construction, we cannot read the "proximate result" language in § 2259(b)(3)(F) as applying to the categories of losses in § 2259(b)(3)(A)-(E).[10] *See United States v. Burgess*, 684 F.3d 445, 456-57 (4th

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> prohibiting the one activity – hosting a party – that was most likely to cause damage and most likely to occur.

540 U.S. at 27-28, 124 S.Ct. 376.

[10] These circuits, whose approach we discuss later in this opinion, nevertheless inject the statute with a proximate cause requirement through alternative means. *See Monzel*, 641 F.3d at 535; *Aumais*, 656 F.3d at 153.

Cir.2012); *United States v. Aumais,* 656 F.3d 147, 153 (2d Cir.2011); *United States v. Monzel,* 641 F.3d 528, 535 (D.C.Cir.), *cert. denied, Amy, Victim in Misty Child Pornography Series v. Monzel,* ___ U.S. ___, 132 S.Ct. 756, 181 L.Ed.2d 508 (2011). But we do not ignore that other circuits have used tools of statutory construction to conclude that the proximate result language in § 2259(b)(3)(F) applies to the five categories of loss that preceded it.[11] *See United States v. McDaniel,* 631 F.3d 1204, 1208-09 (11th Cir.2011); *United States v. Laney,* 189 F.3d 954, 965 (9th Cir.1999). These circuits, however, reached this

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[11] This disagreement does not mean that our plain-meaning analysis is fraught with any ambiguity. This court considers a statute ambiguous when a statute is subject to more than one reasonable interpretation or more than one accepted meaning. *See Carrieri,* 393 F.3d at 518-19. Even though we choose a course that differs from that of our sister circuits, a division of judicial authority is not enough to render a statute ambiguous. *See Reno v. Koray,* 515 U.S. 50, 64-65, 115 S.Ct. 2021, 132 L.Ed.2d 46 (1995) (discussing this principle in context of rule of lenity). Any "seeming agreement on a standard [in our sister circuits] suggests more harmony than there is." *United States v. Kearney,* 672 F.3d 81, 96 (1st Cir.2012). The First Circuit has correctly observed that the various circuits have applied a proximate cause test to similar, if not identical facts, yet reached differing outcomes that "cannot be entirely explained by differences in the facts of record." *See id. Compare Monzel,* 641 F.3d at 537-40 (concluding that proximate cause shown but remanding to determine the amount of harm so caused) and *McDaniel,* 631 F.3d at 1209 (holding that the district court did not clearly err in finding proximate cause) *with McGarity,* 669 F.3d at 1267-70 (concluding that proximate cause was not established), *Aumais,* 656 F.3d at 154-55 (same), and *Kennedy,* 643 F.3d at 1263-65 (same).

conclusion for reasons we do not find compelling. The Eleventh Circuit, for example, applied *Porto Rico Railway*'s rule without accounting for the Supreme Court's application of it. *See* § IV-C-1-a *supra* (exposing the fault in relying on the rule of *Porto Rico Railway*). The Ninth Circuit, moreover, read the "as a result of" language in § 2259's definition of victim together with the "proximate result" language in § 2259(b)(3)(F) to infuse all of § 2259(b)(3) with a proximate cause requirement. *See Laney,* 189 F.3d at 965. Without more in the statute to support that analysis, we cannot accept the Ninth Circuit's conclusion. To do so would contradict the statute's plain terms and be tantamount to judicial redrafting. *See United States v. Naftalin,* 441 U.S. 768, 773, 99 S.Ct. 2077, 60 L.Ed.2d 624 (1979) ("The short answer is that Congress did not write the statute that way."). The rules of statutory construction, properly applied, cannot be used to extend the proximate result language contained in § 2259(b)(3)(F) to the categories of losses preceding it.[12]

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[12] The dissenting opinion authored by Judge Davis criticizes the majority analysis's inconsistency with *Porto Rico Railway.* Like the Eleventh Circuit, however, Judge Davis's dissent fails to properly account for the statute in that opinion and § 2259's significantly differing contexts. Like the Ninth Circuit, this dissenting opinion attempts to cloak the entire statute with a proximate causation requirement with only scant and scattered causal language as support; the dissenting opinion also resorts to language that applies to the procedures with which restitution is issued and enforced within § 3664 to improperly bolster its position. While making the same errors as our sister circuits,

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Next, we consider the Government's assertion that principles of tort liability limit the award of

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the dissenting opinion does not explain why the rule of last antecedent does not apply. Its position is ultimately unpersuasive.

Judge Southwick's dissenting opinion does not agree with Judge Davis's analysis, but it would similarly resort to the language of § 3664 and § 3663A to require proximate causation. The dissenting opinions are correct that § 2259 directs that "[a]n order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A." Judge Southwick's dissenting opinion construes this language to require application of § 3663A's definition of victim as "a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered." Congress' directive to rely on the procedures guiding issuance and enforcement of a restitution order, however, does not require us to rely on the substantive definition of "victim" contained in a separate statute when § 2259 has already supplied courts with a different, broader definition of victim.

Lastly, Judge Davis's dissenting opinion claims that under our holding, "if Amy were injured in an automobile accident on the way to a counseling session, those damages would be included in a restitution award." This is not what the majority opinion suggests. Rather, the majority refuses to artificially divide responsibility for a crime victim's losses in circumstances like these here, where multiple defendants are realistically responsible for the victim's indivisible injury. While the dissent attempts to correct this error by adopting a collective causation theory, in doing so, it resorts to an unnecessary source in order to graft upon the clearly-worded statute a causation requirement. Ultimately the dissenting opinion's errors arises from its confusion of the "victim" inquiry which is antecedent to the calculation of "total losses."

restitution under § 2259 to losses proximately caused by a defendant's criminal actions. At least three of our sister circuits have accepted this view and derived a proximate cause requirement not from "the catch-all provision of § 2259(b)(3)(F), but rather [from] traditional principles of tort and criminal law and [from] § 2259(c)'s definition of 'victim' as an individual harmed 'as a result' of the defendant's offense." *Monzel,* 641 F.3d at 535; *accord Burgess,* 684 F.3d at 457-58; *Aumais,* 656 F.3d at 153; *see Kearney,* 672 F.3d at 96-97 ("It is clear to us that Congress intended some causal link between the losses and the offense to support the mandated restitution."); *United States v. Evers,* 669 F.3d 645, 659 (6th Cir.2012) (adopting a proximate cause requirement but declining to decide between the two approaches of our sister circuits).

In *United States v. Monzel,* a case that has served as a springboard for other circuits evaluating § 2259, the D.C. Circuit explained that "[i]t is a bedrock rule of both tort and criminal law that a defendant is only liable for harms he proximately caused," and "a restitution statute [presumably] incorporates the traditional requirement of proximate cause unless there is good reason to think Congress intended the requirement not to apply." *Monzel,* 641 F.3d at 535-36 (footnote omitted) (citing WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 6.4, at 464, 471 (2d ed.2003)). The D.C. court posited that "[a]lthough § 2259 is a criminal statute, it functions much like a tort statute by directing the court to make a victim

whole for losses caused by the responsible party," *see id.* at 536 n. 5, and found nothing in the text of § 2259 indicating Congress' intent to eliminate "the ordinary requirement of proximate cause." *Id.* at 536. Rather, "[b]y defining 'victim' as a person harmed 'as a result of' the defendant's offense,'" the court inferred that "the statute invokes the standard rule that a defendant is liable only for harms that he proximately caused." *Id.* The D.C. Circuit worried that without such a limitation, "liability would attach to all sorts of injuries a defendant might indirectly cause, no matter how 'remote' or tenuous the causal connection." *Id.* at 537.

The D.C. Circuit rejected the view expressed by the *In re Amy Unknown* panel, explaining that "[h]ad Congress meant to abrogate the traditional requirement for everything but the catch-all, surely it would have found a clearer way of doing so." *Id.* at 536-37. The D.C. Circuit criticized this court's decision in *Amy* because "a 'general' causation requirement without a subsidiary proximate causation requirement is hardly a requirement at all"; "[s]o long as the victim's injury would not have occurred but for the defendant's offense, the defendant would be liable for the injury." *Id.* at 537 n. 8. The circuits that have adopted the D.C. Circuit's view have pursued a similar line of reasoning. We do not accept this reasoning, however, and refuse to inject the statute with a proximate cause requirement based on traditional principles of liability.

The Supreme Court has explained that we "ordinarily" should "resist reading words or elements into a statute that do not appear on its face." *Bates*, 522 U.S. at 29, 118 S.Ct. 285. But the Supreme Court has also explained that the absence of certain language in a statute does not necessarily mean that Congress intended courts to disregard traditional background principles. *See U.S. Gypsum Co.*, 438 U.S. at 437, 98 S.Ct. 2864. To illustrate, with respect to the question of intent in the criminal provisions of the Sherman Act, the Supreme Court has explained that

> "[M]ere omission . . . of intent [in the statute] will not be construed as eliminating that element from the crimes denounced"; instead Congress will be presumed to have legislated against the background of our traditional legal concepts which render intent a critical factor, and "absence of contrary direction [will] be taken as satisfaction with widely accepted definitions, not as a departure from them."

Id. at 437, 98 S.Ct. 2864 (quoting *Morissette v. United States*, 342 U.S. 246, 263, 72 S.Ct. 240, 96 L.Ed. 288 (1952)). In interpreting the omission of intent in a different statute, the Supreme Court cautioned that "far more than the simple omission of the appropriate phrase from the statutory definition [of the offense] is necessary to justify dispensing with" a mens rea requirement. *Liparota v. United States*, 471 U.S. 419, 426, 105 S.Ct. 2084, 85 L.Ed.2d 434 (1985) (quoting *U.S. Gypsum*, 438 U.S. at 438, 98 S.Ct. 2864); *see id.* ("[T]he failure of Congress explicitly and

unambiguously to indicate whether mens rea is required does not signal a departure from this background assumption of our criminal law.").

With these principles in mind, the D.C. Circuit's analysis, which infuses § 2259 with a generalized proximate cause requirement, *see Monzel,* 641 F.3d at 535, could comport with the Supreme Court's interpretative guidance – only if § 2259 were naked of causal limitations. *See U.S. Gypsum Co.*, 438 U.S. at 437, 98 S.Ct. 2864. But it is not. In assessing whether Congress intended a broad proximate cause limitation, we cannot ignore that § 2259 expresses causal requirements, yet isolates them to two discrete points: the definition of victim as an "individual harmed *as a result of* a commission of a crime," and the limitation of "any other losses" to those that are the "*proximate result* of the offense." *See* 18 U.S.C. § 2259(b), (c) (emphases added). Had Congress omitted all causal language and not required award of the full amount of losses, or positioned the proximate result language so that it would apply to all categories of losses, we could consider the possibility that Congress intended to bind all categories of losses with a proximate cause requirement. Instead, Congress resisted using the phrase "proximate cause" anywhere in § 2259, including § 2259(b)(3)(F) and further required the court to order the "full amount of the victim's losses."[13] *See id.* The selective inclusion and

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[13] In stark contrast, other restitution statutes contain more forceful causation requirements that are lacking in § 2259.

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omission of causal requirements in § 2259's subsections, together with language pointing away from ordinary causation, suggest that Congress intended to depart from, rather than incorporate, a tradition of generalized proximate cause.

This interpretation does not render the statute unworkable. The problem seeming to animate the cases in other circuits interpreting § 2259 to require proximate cause is how to allocate responsibility for a victim's harm to any single defendant. *See Burgess*, 684 F.3d at 459-61; *Aumais*, 656 F.3d at 153-54; *Kennedy*, 643 F.3d at 1265-66; *Monzel*, 641 F.3d at 537-40. These courts ignore, however, that deciding that a defendant "must pay restitution for the losses he caused (whether proximately or not)," does not resolve how the court "determines how those losses should be allocated in cases where more than one offender caused them" – injecting the statute with traditional proximate causation limitations takes courts no closer to determining what each defendant must pay or to supplying crime victims with the "full amount of [their] losses." *Burgess*, 684 F.3d at 462 (Gregory, J., concurring in part, dissenting in part, and concurring in judgment) ("The question of whether a defendant proximately caused some injury is entirely

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Compare 18 U.S.C. § 3663A(a)(2) (explaining that a victim is "a person directly and proximately harmed as a result of the commission of an offense") *with id.* § 2259(c) (defining a victim as "the individual harmed as a result of a commission of a crime").

separate from the question of how those proximately caused losses should be allocated among several offenders."). By focusing on the question of proximate cause, our sister circuits have not made § 2259 any easier to apply and seemingly have ignored that § 2259 has armed courts with tools to award restitution because it instructs courts to refer to the standards under § 3664.[14] *See id.* § 2259(b)(2) ("An order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A.").

Section 3664 instructs that courts may enforce a restitution order "by all other available and reasonable

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[14] Any possible difficulty in ordering restitution in these cases arises not from the statutory construction, but from the type of crime underlying these appeals. It is quite possible that no other crime is like the crime of distribution, receipt, and possession of child pornography punishable under § 2252: No other crime involves single victims harmed jointly by defendants acting independently in the country. *See Burgess*, 684 F.3d at 461 (Gregory, J., concurring in part, dissenting in part, and concurring in judgment) (discussing the indivisibility of the injury to victims of child pornography crimes). Yet, the unique factual scenario that undergirds the application of this restitution statute need not muddle our analysis. We cannot interpret this statute to reach a result unsupported by its plain terms. *See Germain*, 503 U.S. at 254, 112 S.Ct. 1146 (quoting *Rubin*, 449 U.S. at 430, 101 S.Ct. 698) (explaining that where "the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'"); *see also In re Amy*, 591 F.3d at 797 (Dennis, J., dissenting) ("Congress intended to afford child victims ample and generous protection and restitution, not to invite judge-made limitations patently at odds with the purpose of the legislation.").

means," *id.* § 3664(m)(1)(A)(ii), and offers a "means" to aid courts in awarding restitution in a way that would ensure that Amy receives the full amount of her losses, to the extent possible, while also ensuring that no defendant bears more responsibility than is required for full restitution: joint and several liability. Where "the court finds more than 1 defendant has contributed to the loss of a victim," § 3664(h) instructs that "the court may make each defendant liable for payment of the full amount of restitution."[15]

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[15] As Judge Davis's dissenting opinion points out, § 3664(h) fully reads:

> If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution *or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant.*

(emphasis added).

Judge Davis's dissenting opinion would read the italicized portion of 3664(h) to allow district courts the discretion to circumvent § 2259's command to award a crime victim the full amount of his or her losses. Thus, § 2259 dictates that the circumstances underlying child pornography convictions under § 2252 do not permit division of liability for reasons this opinion has already explained; the injury victims like Amy suffer does not produce a loss capable of division. *See* note 14 *supra*. We echo the criticism of this approach embodied in Judge Southwick's dissenting opinion:

> In light of the unique nature of prosecutions of child pornography and the clear congressional intent to maximize awards, any doubts about the proper amount of restitution should be resolved in favor of the child. . . . I am concerned that [Judge Davis's]

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The joint and several liability mechanism applies well in these circumstances, where victims like Amy are harmed by defendants acting separately who have caused her a single harm.[16] *See Burgess*, 684 F.3d at 461 (Gregory, J., concurring in part, dissenting in part, and concurring in judgment) (explaining that the joint and several liability described in § 3664 "'has long been available . . . in which two negligent actors, acting independently of one another, caused by a single indivisible harm to the plaintiff.'") (quoting TORT LAW: RESPONSIBILITIES AND REDRESS 517 (John C.P. Goldberg et al. eds., 2008)). And although the D.C. Circuit has expressed that it is "unclear . . . whether joint and several liability may

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> emphasis on the discretion of a district court . . tends towards accepting inappropriately low, even nominal awards. I would not accept that a forward-looking estimate of the number of future defendants and awards should be used to estimate a percentage of overall liability to be given a particular defendant. That puts too much weight on the interests of the defendants. Overcompensation is an unlikely eventuality.

[16] Writing separately in the Fourth Circuit's recent opinion analyzing § 2259, Judge Gregory explained the indivisibility of pornography victims' harms:

> If [a defendant] proximately caused [a victim like Amy]'s psychological injury, this injury is indivisible from the psychological injuries proximately caused by the other offenders. I do not believe a fact finder could meaningfully say precisely *x* amount of [the victim]'s psychological injuries were caused by [the defendant]'s watching the same video.

Burgess, 684 F.3d at 461 (Gregory, J., concurring in part, dissenting in part, and concurring in judgment).

be imposed upon defendants in separate cases," *Monzel*, 641 F.3d at 539, nothing in § 3664 forbids it, either expressly or through implication; the fact that it conforms well to this context supports its application.

Any fears that Amy and victims like her might be overcompensated through the use of joint and several liability, as expressed under § 3664(h), are unwarranted. *See, e.g., Burgess*, 684 F.3d at 458 ("While full compensation would be unlikely from any individual defendant, [the victim's] proposed interpretation of the restitution statute places no cap on her ultimate recovery, and would allow her to recover the amount of her losses many times over."). The use of joint and several liability does not mean that Amy may "recover more than her total loss: [rather,] once she collects the full amount of her losses from one defendant, she can no longer recover from any other." *Id.* at 462 (Gregory, J., concurring in part, dissenting in part, & concurring in judgment) (quoting TORT LAW, *supra*, at 517).

Section 3664 provides "reasonable means" to defend against any theoretical overcompensation that could result. *See* 18 U.S.C. § 3664(m)(1)(A)(ii). First, if Amy recovers the full amount of her losses from defendants, the Government and defendant may use this information to ensure that Amy does not seek further awards of restitution. *See id.* § 3664(e) (explaining that the court may resolve "[a]ny dispute as to the proper amount or type of restitution . . . by the preponderance of the evidence."). Second, § 3664(k)

suggests a means for ending defendants' existing joint and several restitution obligations once Amy receives the full amount of her losses; it allows for a district court, "on its own motion, or the motion of any party, including the victim, [to] adjust the payment schedule, or require immediate payment in full, as the interests of justice require." This broadly phrased subsection seems to enable courts to apply joint and several liability across jurisdictions because it permits those courts to adjust restitution orders as victims receive the full amount of their losses.[17] More concretely, if Amy one day receives the full amount of restitution representing the "full amount of [her] losses" under § 2259, district courts across the nation may amend the judgments of defendants to reflect this fact under § 3664(k) by terminating further restitution obligations.[18]

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[17] Use of this mechanism does not violate § 3664(f)(1)(B)'s command that courts may not consider a victim's receipt of compensation from other sources "in determining the amount of restitution" because § 2259 limits a victim's recovery to the full amount of his or her losses. Section 2259(b)(4)(B)'s similar instruction that a court may not decline to issue a restitution order "because of . . . the fact that a victim has, or is entitled to, receive compensation for his or her injuries from . . . any other source" reinforces this conclusion. Section 2259(b)(4)(B), read together with § 3664(b), (f)(1)(B), reinforces the mandatory nature of § 2259 by disallowing district courts from declining to issue restitution to crime victims while simultaneously honoring the cap § 2259 places on victims' recovery: the full amount of a victim's losses.

[18] Of course, even while Amy may not collect more than to which she is entitled, she may certainly obtain judgments in

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In either circumstance, district courts must be in possession of evidence to support entry of restitution or amendment of the defendants' judgments. There are several potential sources of this information. Victims, of course, are in the best position to know what restitution they have recovered and what restitution they have yet to receive. In addition to information obtained from victims, the Government may rely on information maintained by the probation office and other arms of the U.S. Department of Justice to ensure that amounts reported by a victim are accurate.[19] Defendants may dispute any amounts in these requests, and, under § 3664(e), the court may resolve "[a]ny dispute as to the proper amount or type of restitution . . . by the preponderance of the evidence."[20]

c

Next, the Government asserts that not restricting the recovery of losses by proximate cause produces an absurd result – constitutional implications that

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excess of that amount. Indeed, Amy has already obtained judgments exceeding $3.4 million.

[19] The comprehensive information the Government has provided in this case regarding the restitution ordered in other cases involving Amy confirms the Government's access to this type of information.

[20] Nothing in § 2259, § 3664, or in this opinion is intended to restrict the district court's ability to use any other mechanisms available under § 3664 to order restitution in a manner that effects § 2259's purposes.

could be avoided if we were to read § 2259 as requiring proximate causation with respect to all categories of losses. *See Lamie,* 540 U.S. at 534, 124 S.Ct. 1023 (instructing that courts must enforce a statute's terms so long as "the disposition required by the text is not absurd."). Specifically, the Government is concerned that without a proximate cause limitation, § 2259 could be challenged on the ground that it subjects a defendant to excessive punishment under the Eighth Amendment.

The Eighth Amendment prescribes that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The Government posits that by giving effect to the statute's plain text, this court could cause Eighth Amendment problems similar to that expressed by a recent Supreme Court case involving criminal forfeiture: Where criminal forfeiture "would be grossly disproportional to the gravity of [an] offense," the Supreme Court held that it would violate the Excessive Fines Clause of the Eighth Amendment. *United States v. Bajakajian,* 524 U.S. 321, 324, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998).

First, we are not persuaded that restitution is a punishment subject to the same Eighth Amendment limits as criminal forfeiture. Its purpose is remedial, not punitive. *See United States v. Webber,* 536 F.3d 584, 602-03 (7th Cir.2008) ("Forfeiture and restitution are distinct remedies. Restitution is remedial in nature, and its goal is to restore the victim's loss.

Forfeiture, in contrast, is punitive; it seeks to disgorge any profits that the offender realized from his illegal activity.") (citations omitted); *see also United States v. Taylor*, 582 F.3d 558, 566 (5th Cir.2009) ("Restitution operates to make the victim of the crime whole."). Even so, restricting the "proximate result" language to the catchall category in which it appears does not open the door to grossly disproportionate restitution in a way that would violate the Eighth Amendment. Section 2259 contains discrete causal limitations that precede the restitutionary right; restitution thus is limited to losses arising out of a victim's injury. *See* 18 U.S.C. § 2259(c) (imposing general causation requirement on definition of victim). Furthermore, the mechanisms under § 3664, which have already been described, further allay any concerns as to over-punishment. Fears over excessive punishment are misplaced.

Any concern that individual defendants may bear a greater restitutionary burden than others convicted of possessing the same victim's images, moreover, does not implicate the Eighth Amendment or threaten to create an absurd result. *See Arledge*, 553 F.3d at 899. Restitution is not tied to the defendant's gain; rather "so long as the government proved that the victim suffered the actual loss that the defendant has been ordered to pay, the restitution is proportional." *Id.* Even where a district court selectively imposed restitution on one co-defendant and not another, this court has treated this seeming inequality as being "of no consequence." *See id.* (citing *United States v.*

Ingles, 445 F.3d 830, 839 (5th Cir.2006)) (explaining that "a district court may consider the relative degrees of responsibility of co-defendants in imposing restitution obligations and therefore, the simple fact that like punishment was not imposed on [the co-defendants] does not offend the constitution" (internal quotation marks and citations omitted)). Thus, the fact that some defendants, like Paroline and Wright, will be held jointly and severally liable for the full amount of Amy's losses, while other defendants convicted of possessing Amy's images may not be (because, for example, the Government or Amy does not seek restitution from them) does not offend the Eighth Amendment. *See id.*

The court, moreover, can ameliorate the impact of joint and several liability on an individual defendant by establishing a payment schedule that corresponds to the defendant's ability to pay. *See, e.g.*, Judgment at 7, *United States v. Wright*, No. 09-CR-103 (E.D.La. Dec. 16, 2009) (explaining the payment of restitution "shall begin while the defendant is incarcerated [and u]pon release, any unpaid balance shall be paid at a rate of $200.00 per month" and further explaining that "[t]he payment is subject to increase or decrease, depending on the defendant's ability to pay."); *see also* 18 U.S.C. § 3664(e) ("The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant's dependents, shall be on the defendant.").

Ultimately, while the imposition of full restitution may appear harsh, it is not grossly disproportionate

to the crime of receiving and possessing child pornography. *Cf. id.* at 899-900 (rejecting Eighth Amendment challenge to the imposition of full restitution, pursuant to joint and several liability, under Mandatory Victims Restitution Act, in context of mail fraud case). In light of restitution's remedial nature, § 2259's built-in causal requirements, and the mechanisms described under § 3664, we do not see any Eighth Amendment concerns here or any other absurd results that our plain reading produces.

2

Accordingly, we hold that § 2259 requires a district court to engage in a two-step inquiry to award restitution where it determines that § 2259 applies. First, the district court must determine whether a person seeking restitution is a crime victim under § 2259 – that is, "the individual harmed as a result of a commission of a crime under this chapter." 18 U.S.C. § 2259(c). The Supreme Court has acknowledged that "[t]he distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children," *New York v. Ferber,* 458 U.S. 747, 759, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982), and this court has elaborated that "children depicted in child pornography may be considered to be the victims of the crime of receiving child pornography." *United States v. Norris,* 159 F.3d 926, 929 (5th Cir.1998). This logic applies with equal force to defendants who possess child pornography: By possessing, receiving, and distributing child

pornography, defendants collectively create the demand that fuels the creation of the abusive images. Thus, where a defendant is convicted of possessing, receiving, or distributing child pornography, a person is a victim under this definition if the images the defendant possesses, receives, or distributes include those of that individual.

Second, the district court must ascertain the full amount of the victim's losses as defined under § 2259(b)(3)(A)-(F), limiting only § 2259(b)(3)(F) by the proximate result language contained in that subsection, and craft an order guided by the mechanisms described in § 3664, with a particular focus on its mechanism for joint and several liability.

IV

Having resolved this important issue of statutory interpretation, we apply our holding to Amy's mandamus and Wright's appeal.

A

Under our traditional mandamus inquiry, we will grant Amy's petition for mandamus if (1) she has no other adequate means to attain the desired relief; (2) she has demonstrated a clear and indisputable right to the issuance of a writ; and (3) in the exercise of our discretion, we are satisfied that the writ is appropriate in these circumstances. *See Dean*, 527 F.3d at 394. As the Supreme Court has noted, the "hurdles"

limiting use of mandamus, "however demanding, are not insuperable." *Cheney v. U.S. Dist. Court,* 542 U.S. 367, 381, 124 S.Ct. 2576, 159 L.Ed.2d 459 (2004).

We easily conclude that the first prong is met. Because we have held that the CVRA limits crime victims' relief to the mandamus remedy, Amy has no other means for obtaining review of the district court's decision not to order restitution. *See supra* § II-A. We are also satisfied that a writ is appropriate in these circumstances: The CVRA expressly authorizes mandamus, 18 U.S.C. § 3771(d)(3), and awarding restitution would satisfy § 2259's broad restitutionary purpose. Next, we conclude that Amy has a "clear and indisputable" right to restitution in light of our holding today. First, Amy is a "victim" under § 2259(c). Paroline possessed at least two of her images, and his possession of those images partly formed the basis of his conviction. *See Ferber,* 458 U.S. at 759, 102 S.Ct. 3348; *Norris,* 159 F.3d at 929. Amy, as an "individual harmed as a result of [Paroline's] commission of a crime" falling within § 2259's scope, is thus a victim under § 2259. *See Kearney,* 672 F.3d at 94 ("Any argument that [Amy] has not suffered harm as a result of [Paroline's] crimes defies both fact and law."). Because Amy is a victim, § 2259 required the district court to award her restitution for the "full amount of [her] losses" as defined under § 2259(b)(3). Because the district court awarded Amy nothing, it therefore clearly and indisputably erred. No matter what discretion the district court possessed and no

matter how confounding the district court found § 2259, it was not free to leave Amy with nothing.

On remand, the district court must enter a restitution order reflecting the "full amount of [Amy's] losses" in light of our holdings today.

B

Turning to Wright's appeal, Amy is eligible for restitution as a "victim" of Wright's crime of possessing images of her abuse for the same reasons she is eligible as a victim of Paroline's crime. *See supra* § IV-A. It was therefore legal for the district court to order restitution to Amy. *See Arledge*, 553 F.3d at 897 (reviewing the legality of the restitution order de novo). Wright's appeal therefore necessarily focuses on the amount of the district court's restitution award, which we review for an abuse of discretion. *Id.* The district court awarded Amy $529,661 by adding Amy's estimated future counseling costs to the value of her expert witness fees. The district court did not explain why Wright should not be required to pay for any of the other losses Amy requested, and the record does not otherwise disclose why the district court reduced the Government's full request on Amy's behalf. Because the district court's order of restitution is seemingly at odds with § 2259's requirement that it award Amy the full amount of her losses, we vacate the district court's order and remand for reconsideration of restitution in light of this opinion.

V

For the reasons above, we reject the approach of our sister circuits and hold that § 2259 imposes no generalized proximate cause requirement before a child pornography victim may recover restitution from a defendant possessing images of her abuse. We VACATE the district courts' judgments below and REMAND for proceedings consistent with this opinion.[21]

DENNIS, Circuit Judge, concurring in part in the judgment:

I respectfully concur in the majority opinion's decision that the CVRA does not grant crime victims a right to a direct appeal from a district court's rejection of her claim for restitution under 18 U.S.C. § 2259; that the CVRA grants crime victims only a right to seek traditional mandamus review; and that the CVRA grants the government the right to seek mandamus and to retain its right to a direct appeal.

I further agree with the majority that neither the Government nor the victim is required to prove that the victim's losses defined by 18 U.S.C. § 2259(b)(3)(A)-(E) were a proximate result of the defendant's crime; it is only "any other loss suffered by the victim" that must be proved to be "a proximate result of the offense." *Id.* § 2259(b)(3)(F). Section

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[21] Amy's motion to strike portions of the Government's brief is DENIED.

2259(c) defines "victim" as an "individual harmed as a result of a commission of a crime under this chapter," but it does not require a showing that the victim's losses included in § 2259(b)(3)(A)-(E) be a "proximate result of the offense." From this, I infer that the statute places only a slight burden on the victim or the government to show that the victim's losses or harms enumerated in those subsections plausibly resulted from the offense. Once that showing has been made, in my view, a presumption arises that those enumerated losses were the proximate result of the offense, which the defendant may rebut with sufficient relevant and admissible evidence.

Finally, I agree with the majority's conclusion that where a defendant is convicted of possessing child pornography, a person is a victim under the statute if the images include those of that individual. In these cases, I agree that the government and the victim have made a sufficient showing, unrebutted by the defendant, that the victim is entitled to restitution of losses falling under 18 U.S.C. § 2259(b)(3)(A)-(E). Therefore, I concur in that part of the majority's judgment that vacates the district courts' judgments and remands the cases to them for further proceedings.

In remanding, however, I would simply direct the district courts to proceed to issue and enforce the restitution orders in accordance with 18 U.S.C. § 3664 and 3663A, as required by § 2259(b)(2). Going forward, I believe it best to permit district courts to craft procedural and substantive devices for ordering

restitution that would take into account both the mandatory nature of full restitution for crime victims under section 2259 and the mechanical difficulties of crafting orders given the possibility of multiplicitous liability among hundreds of defendants under circumstances that may change over time. While I admire the majority's effort to provide guidance to the district courts in their extremely difficult task of molding and merging these federal statutes, §§ 2259, 3663A, and 3664, into a legal, just, and predictable system, I believe that effort is premature in this court at this time on the present record. Rather, I would leave the decision as to how to proceed under these statutes to the district courts, which may decide to take additional evidence and require study and briefing by the parties to assist them in these difficult cases.

W. EUGENE DAVIS, Circuit Judge, concurring in part and dissenting in part, joined by KING, JERRY E. SMITH and GRAVES, Circuit Judges:

I agree with my colleagues in the majority that we should grant mandamus in *In re Amy* and remand for entry of a restitution award.[1] I also agree that we should vacate the award entered in *Wright* and remand for further consideration on the amount of

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[1] Section 2259 directs courts to "order restitution for any offense under this chapter." District courts do not have discretion to make no award.

the award. The devil is in the details, however, and I disagree with most of the majority's analysis.

I disagree with my colleagues in the majority in two major respects:

> 1. Although I conclude that the proximate cause proof required by the restitution statutes can be satisfied in these cases, I disagree with the majority that the statute authorizes restitution without any proof that the violation proximately caused the victim's losses.
>
> 2. I agree with the majority that the district court must enter a restitution award against every offender convicted of possession of the victim's pornographic image; but I disagree with the majority that in cases such as these two, where the offenses of multiple violators contribute to the victim's damages, the district court must enter an award against each offender for the full amount of the victim's losses. No other circuit that has addressed this issue has adopted such a one size fits all rule for the restitution feature of the sentence of an offender. Other circuits have given the district courts discretion to assess the amount of the restitution the offender is ordered to pay. *See, e.g., United States v. Burgess,* 684 F.3d 445, 460 (4th Cir.2012); *United States v. Kearney,* 672 F.3d 81, 100-01 (1st Cir.2012); *United States v. McGarity,* 669 F.3d 1218, 1270 (11th Cir.2012); *United States v. Laney,* 189 F.3d 954, 967 (9th Cir.1999).

I.

THE STATUTES

At bottom, this is a statutory interpretation case, and I begin with a consideration of the structure and language of the statutes at issue that facially belie the majority's position that victims may be awarded restitution for losses not proximately caused by offense conduct. Section 2259 specifically governs mandatory restitution awards for crimes related to the sexual exploitation and abuse of children. A number of provisions in the statute make it clear that proof of a causal connection is required between the offenses and the victim's losses.

Section 2259(b)(2) expressly incorporates the general restitution procedures of 18 U.S.C. § 3664 and states that "[a]n order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A." Section 3664(e) states that "[t]he burden of demonstrating the *amount of the loss* sustained by a victim *as a result of the offense* shall be on the attorney for the Government." (emphasis added).

This language requiring proof of causation from § 3664(e) is consistent with the language defining "victim" found in § 2259(c), who is defined as "the individual harmed *as a result of* a commission of crime under this chapter. . . ." (emphasis added).

Section 2259(a) states that the court "shall order restitution for any offense under this chapter." Section 2259(b)(3) states that the victim's losses are defined as those suffered by the victim "as a proximate result of the offense." The full text of § 2259(b)(3) is as follows:

> [T]he term "full amount of the victim's losses" includes any costs incurred by the victim for –
>
> (A) medical services relating to physical, psychiatric, or psychological care;
>
> (B) physical and occupational therapy or rehabilitation;
>
> (C) necessary transportation, temporary housing, and child care expenses;
>
> (D) lost income;
>
> (E) attorneys' fees, as well as other costs incurred; and
>
> (F) any other losses suffered by the victim *as a proximate result of the offense.*

(emphasis added).

In interpreting this provision we should follow the fundamental canon of statutory construction established by the Supreme Court in *Porto Rico Railway, Light & Power Co. v. Mor,* 253 U.S. 345, 40 S.Ct. 516, 64 L.Ed. 944 (1920). In that case, the Court held that "[w]hen several words are followed by a clause which is applicable as much to the first and

other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." *Id.* at 348, 40 S.Ct. 516. Applying this cardinal rule of statutory interpretation, I conclude that subsection (F)'s "as a proximate result of the offense" language applies equally to the previous five subcategories of losses, (A) through (E). This interpretation was accepted by the Eleventh Circuit in *United States v. McDaniel,* 631 F.3d 1204, 1209 (11th Cir.2011) ("The phrase 'as a proximate result of the offense' is equally applicable to medical costs, lost income, and attorneys' fees as it is to 'any other losses.'" (citing *Porto Rico Ry.,* 253 U.S. at 348, 40 S.Ct. 516)); *see also Laney,* 189 F.3d at 965 (reading the "as a result of" language in § 2259's definition of victim together with the "proximate result" language in § 2259(b)(3)(F) to infuse all of 2259(b)(3) with a proximate cause requirement).

In contrast, the majority concludes that once the district court determines that a person is a victim (an individual harmed as a result of an offense under § 2259) the district court must order restitution without further proof of causation.[2]

The majority's reading of § 2259(b)(3) is patently inconsistent with the rule of statutory interpretation

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[2] The majority would apparently hold that if Amy were injured in an automobile accident on the way to a counseling session, those damages would be included in a restitution award.

announced in *Porto Rico Railway,* which makes it clear that the clause should be read to apply to all categories of loss.[3] My conclusion that *Porto Rico Railway*'s rule of interpretation applies in this case is made even clearer when we consider the multiple references in the statutes discussed above expressly reflecting Congressional intent to require proof of causation.

The D.C. Circuit and other circuits have reached the same conclusion – that is, that § 2259 requires proof of proximate cause – albeit by a slightly different reasoning. *See United States v. Monzel,* 641 F.3d 528, 535-37 (D.C.Cir.2011); *United States v. Aumais,* 656 F.3d 147, 153 (2d Cir.2011); *Burgess,* 684 F.3d at 459. The D.C. Circuit explained that it is

> a bedrock rule of both tort and criminal law that a defendant is only liable for harms he proximately caused. ("An essential element of the plaintiff's cause of action for negligence, or . . . any other tort, is that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered. This connection usually is dealt with by the courts in

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[3] I am not persuaded by *In re Amy*'s attempt to distinguish the statute in *Porto Rico Railway* on the basis that the subcategories of § 2259(b)(3) are separated by semicolons rather than commas. *See In re Amy Unknown,* 636 F.3d 190, 199 (5th Cir.2011). Either punctuation device is an acceptable method of separating clauses. *See* BRYAN A. GARNER, THE REDBOOK: A MANUAL ON LEGAL STYLE 1-15 (2d. ed.2006).

> terms of what is called 'proximate cause'. . . .").

(footnote omitted) (citation omitted) (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 263 (5th ed.1984)); *see also* WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 6.4, at 464 (2d ed. 2003) ("[For] crimes so defined as to require not merely conduct but also a specified result of conduct, the defendant's conduct must be the 'legal' or 'proximate' cause of the result."). "Thus, we will presume that a restitution statute incorporates the traditional requirement of proximate cause unless there is good reason to think Congress intended the requirement not to apply." *Monzel,* 641 F.3d at 536. The court found that "nothing in the text or structure of § 2259 leads us to conclude that Congress intended to negate the ordinary requirement of proximate cause." *Id.*

Other circuits have used different analyses but all circuits to confront this issue have interpreted the statute as using a proximate causation standard connecting the offense to the losses. *See United States v. Evers,* 669 F.3d 645, 658-59 (6th Cir.2012) (finding a proximate cause requirement but declining to choose whether to adopt the *McDaniel* or *Monzel* rationale as they are "complementary"); *Kearney,* 672 F.3d at 96, 99 (adopting a proximate cause standard but not specifying under what analysis); *United States v. Crandon,* 173 F.3d 122, 125-26 (3d Cir.1999) (stating, without analysis, that § 2259 requires damages for losses suffered "as a proximate result of

the offense"). This circuit is the only circuit that has interpreted § 2259 and concluded that proximate cause is not required by the statute.

For the above reasons, I conclude that the statutes at issue require proof that the defendant's offense conduct proximately caused the victim's losses before a restitution award can be entered as part of the defendant's sentence.

II.

CAUSATION

In cases such as the two cases before this court where the conduct of multiple offenders collectively causes the victim's damages, I would follow the position advocated by the Government and adopted by the First Circuit and the Fourth Circuit to establish the proximate cause element required by § 2259. *Kearney,* 672 F.3d at 98-99; *Burgess,* 684 F.3d at 459-60. Under this "collective causation" theory, it is not necessary to measure the precise damages each of the over 100 offenders caused. As the First Circuit in *Kearney* stated: "Proximate cause exists where the tortious conduct of multiple actors has combined to bring about harm, even if the harm suffered by the plaintiff might be the same if one of the numerous tortfeasors had not committed the tort." 672 F.3d at 98. The court relied on the following statement of the rule from Prosser and Keeton:

> When the conduct of two or more actors is so related to an event that their combined

> conduct, viewed as a whole, is a but-for cause of the event, and application of the but-for rule to each of them individually would absolve all of them, the conduct of each is a cause in fact of the event.

KEETON ET AL., *supra*, § 41, at 268.

> The court explained further:
>
> Proximate cause therefore exists on the aggregate level, and there is no reason to find it lacking on the individual level. The Restatement (Third) of Torts has recognized this: causation exits even where "none of the alternative causes is sufficient by itself, but together they are sufficient" to cause the harm.

Kearney, 672 F.3d at 98 (quoting RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 27 reporters' n. cmt. g. (2010); *id.* § 36 cmt. a ("[E]ven an insufficient condition . . . can be a factual cause of harm when it combines with other acts to constitute a sufficient set to cause the harm.")).

I agree with the Government and the First and Fourth Circuits that this definition of proximate cause is appropriate in this context and under this standard the causation requirement in both cases before us is satisfied.

III.

AMOUNT OF THE AWARD

The most difficult issue in these cases – where multiple violators combine to cause horrendous damage to a young victim – is establishing some standards to guide the district court in setting an appropriate restitution award for the single offender before the court.

I agree that Amy is a victim in both cases before us. Defendant Paroline (in *In re Amy*) and defendant Wright possessed Amy's pornographic images and the statute requires the court to enter an award against them.

I agree that Amy is entitled to a restitution award from all of her offenders in a sum that is equal to the amount of her total losses. But in cases such as these where multiple violators have contributed to the victim's losses and only one of those violators is before the court, I disagree that the court must always enter an award against that single violator for the full amount of the victim's losses. I agree that § 3664(h) gives the court the option in the appropriate case of entering an award against a single defendant for the full amount of the victim's losses even though other offenders contributed to these losses. I also agree that in that circumstance the defendant can seek contribution from other offenders jointly liable

for the losses.[4] We have allowed such contribution claims in analogous non-sex offender cases. *E.g.*, *United States v. Arledge,* 553 F.3d 881, 899 (5th Cir.2008) (finding that defendant could "seek contribution from his co-conspirators to pay off the restitution award and reduce the amount he personally owe[d]" in the context of a fraud scheme with multiple participants); *accord United States v. Martinez,* 610 F.3d 1216, 1234 (10th Cir.2010); *United States v. Newsome,* 322 F.3d 328, 340-41 (4th Cir.2003).

In concluding that an award for the full amount of the victim's losses is required the majority relies on § 3664(h) which provides:

> If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or *may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant.*

(emphasis added). The majority simply ignores the second clause in § 3664(h) emphasized above. That subsection plainly gives the court the option of either (1) assessing a restitution award against the single

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[4] The Government argued that contribution would not apply in this context because the statute did not authorize it and, in any event, it would not apply among defendants convicted in different courts; but their authority on this point is very thin and does not directly and strongly support this view.

defendant in an amount that is equal to the victim's total losses or (2) apportioning liability among the defendants to reflect each defendant's level of contribution to the victim's loss taking into consideration a number of factors including the economic circumstances of each defendant. *Accord McGarity*, 669 F.3d at 1270. It would be surprising if Congress had not given courts this option. After all, restitution is part of the defendant's criminal sentence and § 3664(h), consistent with sentencing principles generally, gives the sentencing judge discretion to fix the sentence based on the facts and circumstances surrounding the defendant's circumstances, background, and nature of his conduct. *See, e.g.*, *Burgess*, 684 F.3d at 460; *Kearney*, 672 F.3d at 100-01; *McGarity*, 669 F.3d at 1270; *Laney*, 189 F.3d at 967. One size does not fit all in this context any more than the length of a prison sentence or any other feature of a criminal sentence.

I agree with the majority that the defendants in both cases before us having been convicted of violating 18 U.S.C. § 2252 must be ordered to pay restitution to Amy. We should leave the calculation of the appropriate award against each defendant to the district court in the first instance. I would give the district court the following general guidelines:

> The court must recognize that Amy's losses are an aggregation of the acts of the person who abused and filmed her assault, those who distributed and redistributed her images, and those who possessed those images. The culpability and liability for restitution of

> any one defendant regarding Amy's loss is dependent at least in part on the role that defendant played with respect to her exploitation. *See, e.g., Burgess,* 684 F.3d at 460.

The court should first compute the victim's probable future losses based on evidence of the damages she will likely incur from the date of the defendant's offense conduct into the foreseeable future. The court should consider all items of damage listed in § 2259(b)(3) as well as any other losses suffered by the defendant related to the conduct of the violators of this chapter.

In a case such as this where multiple individuals have been convicted of contributing to her abuse, the district court has the discretion under § 3664(h) either to enter an award for the total amount of her provable losses or some portion of those losses to reflect the defendant's role in causing the damage as well as the other surrounding circumstances.

The district court is not required to justify any award with absolute precision, but the amount of the award must have a factual predicate. In determining whether it should cast the single defendant before it for the total amount of the victim's losses or in fixing the amount of a smaller award the court should consider all relevant facts including without limitation the following:

> 1. The egregiousness of the defendant's conduct including whether he was involved in the physical abuse of this victim or other

victims, and whether he attempted to make personal contact with victims whose images he viewed or possessed.

2. For defendants who possessed images of the victim, consider the number of images he possessed and viewed, and whether the defendant circulated or re-circulated those images to others.

3. The financial means of the defendant and his ability to satisfy an award.

4. The court may consider using the $150,000 liquidated civil damage award authorized by 18 U.S.C. § 2255 or a percentage thereof as a guide in fixing the amount of the award.

5. The court may also consider as a guide awards made in similar cases in this circuit and other circuits.

6. Any other facts relevant to the defendant's level of contribution to the victim's loss and economic circumstances of the defendant.

IV.

CONCLUSION

In summary, I would grant mandamus and vacate the judgment in *In re Amy* and remand that case to the district court to enter an award consistent with the principles outlined above. I would also

vacate the judgment in *Wright* and remand for entry of judgment consistent with the above guidelines.

LESLIE H. SOUTHWICK, Circuit Judge, dissenting:

We are confronted with a statute that does not provide clear answers. I join others in suggesting it would be useful for Congress "to reconsider whether § 2259 is the best system for compensating the victims of child pornography offenses." *United States v. Kennedy*, 643 F.3d 1251, 1266 (9th Cir.2011); *see also United States v. Burgess*, 684 F.3d 445, 460 (4th Cir.2012). The goal is clear: providing meaningful restitution to victims of these crimes. How to order restitution in individual cases in light of that goal is a difficult question.

Our task today is to effectuate the scheme according to the congressional design as best as we can discern it. Both of the other opinions have ably undertaken this difficult task. I agree with Judge Davis that this circuit should not chart a solitary course that rejects a causation requirement. The reasons why I believe the statute requires causation are different than he expresses, though. I agree with the majority, relying on the last-antecedent rule, that the phrase "as a proximate result of the offense" that is in Section 2259(b)(3)(F) only modifies the category of loss described in (F). *See, e.g., Jama v. Immigration*

and Customs Enforcement, 543 U.S. 335, 343, 125 S.Ct. 694, 160 L.Ed.2d 708 (2005).

Though I agree with the majority in that respect, I find persuasive the reasoning of the Second, Fourth, and D.C. Circuits that causation "is a deeply rooted principle in both tort and criminal law that Congress did not abrogate when it drafted § 2259." *United States v. Aumais,* 656 F.3d 147, 153 (2d Cir.2011); *Burgess,* 684 F.3d at 457; *United States v. Monzel,* 641 F.3d 528, 535-36 (D.C.Cir.2011). In a similar vein, the Supreme Court stated that absent "some indication of congressional intent, express or implied," courts will decline to read federal statutory crimes that fail to mention it, as eliminating the *mens rea* requirement that has been a hallmark of crimes since the common law. *Staples v. United States,* 511 U.S. 600, 605-06, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994).

True, the positioning of the phrase "proximate result" solely within subsection (F) could be a sign that Congress meant to eliminate causation for damages falling under subsections (A)-(E). Any such implication is thoroughly defeated, though, by other provisions of the statute. First, as the D.C. Circuit has recognized, Section 2259 calls for restitution to go to a "victim" of these crimes, a term defined as "the individual harmed *as a result* of a commission of a crime under this chapter." *Monzel,* 641 F.3d at 535 (emphasis added). Second, the statute directs that an order of restitution should be issued and enforced "in the same manner as an order under section 3663A." § 2259(b)(2). Under Section 3663A "'victim' means a

person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered." § 3663A(2). The "as a result" language from Section 2259 as well as the more explicit mention of proximate harm in Section 3663A convince me that "nothing in the text or structure of the restitution statute affirmatively indicates that Congress intended to negate the ordinary requirement of proximate causation for an award of compensatory damages." *Burgess*, 684 F.3d at 457; *Monzel*, 641 F.3d at 536.

I understand the contours of this proximate-cause requirement in much the same manner as does Judge Davis, including his analysis of "collective causation." *See also United States v. Kearney*, 672 F.3d 81, 96-98 (1st Cir.2012). I also agree that the option of "apportion[ing] liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant" belies the majority's notion that each case calls for an award equal to the total loss incurred by a victim. § 3664(h). Yet by making restitution "mandatory" for all these crimes of exploitation, including possession and distribution of child pornography, Congress made its "goal of ensuring that victims receive full compensation" plain. *Kearney*, 672 F.3d at 99.

Awards must therefore reflect the need to make whole the victims of these offenses. As Amy's suffering illustrates, the "distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children." *New*

York v. Ferber, 458 U.S. 747, 759, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). They constitute an indelible "record of the children's participation and the harm to the child is exacerbated by their circulation." *Id.*

In light of the unique nature of prosecutions for child pornography and the clear congressional intent to maximize awards, any doubts about the proper amount of restitution should be resolved in favor of the child. This concern is largely a matter of a difference of emphasis from the views expressed by Judge Davis. I am concerned that his emphasis on the discretion of a district court, though clearly that discretion exists and can be exercised under the terms of Section 3664, tends towards accepting inappropriately low, even nominal awards. I would not accept that a forward-looking estimate of the number of future defendants and awards should be used to estimate a percentage of overall liability to be assigned a particular defendant. That puts too much weight on the interests of the defendants. Overcompensation is an unlikely eventuality. Were it to occur, then at that point district courts might be able to shift to evening up contributions among past and future defendants.

In summary, proximate cause must be shown and the principle of aggregate causation is the method for proving its existence. By statute, district courts can award all damages to each defendant but also have discretion to make lesser awards if properly explained. This means that I agree with requiring additional proceedings as to both defendants, but

disagree that each district court is *required* to impose a restitution award of the full amount of damages.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-41238

In re: AMY UNKNOWN,

Petitioner

Consolidated with 09-41254

UNITED STATES OF AMERICA,

Plaintiff-Appellee

DOYLE RANDALL PAROLINE

Defendant-Appellee

v.

AMY UNKNOWN,

Movant-Appellant

No. 09-31215

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

MICHAEL WRIGHT

Defendant-Appellant

Nos. 09-41238 c/w No. 09-41254
No. 09-31215

Appeals from the United States District Courts
for the Eastern District of Texas
and the Eastern District of Louisiana

(Filed Nov. 19, 2012)

Before STEWART, Chief Judge, and KING, JOLLY, DAVIS, JONES, SMITH, GARZA, DENNIS, CLEMENT, PRADO, OWEN, ELROD, SOUTHWICK, HAYNES and GRAVES, Circuit Judges.[1]

GARZA, Circuit Judge, joined by STEWART, Chief Judge, JOLLY, JONES, CLEMENT, PRADO, OWEN, ELROD, and HAYNES, Circuit Judges:

The original opinion in this matter was issued by the en banc court on October 1, 2012. *In re Unknown*, No. 09-41238, 2012 WL 4477444 (5th Cir. Oct. 1, 2012) (en banc). A petition for rehearing en banc is currently pending before the en banc court. The petition for rehearing en banc is granted in part. Accordingly, we WITHDRAW our previous opinion and replace it with the following opinion.[2]

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[1] Judge Higginson is recused and did not participate in any aspect of this en banc rehearing.

[2] In Wright's case, because the Government did not appeal and Amy did not seek mandamus review, we revised our opinion

(Continued on following page)

The issue presented to the en banc court is whether 18 U.S.C. § 2259 requires a district court to find that a defendant's criminal acts proximately caused a crime victim's losses before the district court may order restitution, even though that statute only contains a "proximate result" requirement in § 2259(b)(3)(F). All our sister circuits that have addressed this question have expanded the meaning of § 2259(b)(3)(F) to apply to all losses under § 2259(b)(3), thereby restricting the district court's award of restitution to a victim's losses that were proximately caused by a defendant's criminal acts. A panel of this court rejected that reading, and instead focused on § 2259's plain language to hold that § 2259 does not limit a victim's total recoverable losses to those proximately resulting from a defendant's conduct. A subsequent panel applied that holding to another appeal, yet simultaneously questioned it in a special concurrence that mirrored the reasoning of our sister circuits. To address the discrepancy between the holdings of this and other circuits, and to respond to the concerns of our court's special concurrence, we granted rehearing en banc and vacated the panel opinions.

This en banc court holds that § 2259 only imposes a proximate result requirement in § 2259(b)(3)(F); it does not require the Government to show proximate cause to trigger a defendant's restitution

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to affirm Wright's sentence, in compliance with *Greenlaw v. United States*, 554 U.S. 237 (2008).

obligations for the categories of losses in § 2259(b)(3)(A)-(E). Instead, with respect to those categories, the plain language of the statute dictates that a district court must award restitution for the full amount of those losses. We VACATE the district court's judgment in *United States v. Paroline*, 672 F. Supp. 2d 781 (E.D. Tex. 2009), and REMAND for further proceedings consistent with this opinion. We AFFIRM the district court's judgment in *United States v. Wright*, No. 09-CR-103 (E.D. La. Dec. 16, 2009).

I

We review a set of appeals arising from two separate criminal judgments issued by different district courts within this circuit. Both appeals involve restitution requests by Amy, a young adult whose uncle sexually abused her as a child, captured his acts on film, and then distributed them for others to see. The National Center for Missing and Exploited Children, which reports that it has found at least 35,000 images of Amy's abuse among the evidence in over 3,200 child pornography cases since 1998, describes the content of these images as "extremely graphic." The Government reports that restitution has been ordered for Amy in at least 174 child pornography cases across the United States in amounts ranging from $100 to $3,543,471.

A

In the consolidated cases *In re Amy,* 591 F.3d 792 (5th Cir. 2009), and *In re Amy Unknown,* 636 F.3d 190 (5th Cir. 2011), a panel of this court reviewed Amy's mandamus petition and appeal, both of which challenged the district court's order denying Amy restitution in connection with a criminal defendant's sentence.

In the case underlying Amy's mandamus petition and appeal, Doyle Paroline ("Paroline") pled guilty to 18 U.S.C. § 2252 for possessing 150 to 300 images of minors engaged in sexually explicit conduct. At least two images were of Amy. Pursuant to Amy's right to restitution under the Crime Victims' Rights Act, 18 U.S.C. § 3771, the Government and Amy moved the district court to order restitution under § 2259. Amy supported this request with her psychiatrist's report, which itemized her future damages for specific categories of treatment and estimated total damages nearing $3.4 million.[3]

The district court denied Amy restitution. *Paroline,* 672 F. Supp. 2d at 782. The district court held that § 2259 required the Government to prove that by possessing images depicting Amy's sexual abuse, Paroline proximately caused the injuries for

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[3] Amy attested that this amount reflects the total amount of her losses from the production, distribution, and possession of the images of her abuse and primarily comprises costs for future psychological care and future lost income.

which she sought restitution. *Id.* at 791. Concluding that the Government failed to show this causal link, the district court denied Amy restitution. *Id.* at 793. Amy petitioned for mandamus, asking this court to direct the district court to order Paroline to pay her the full amount of the restitution she had requested.

Over one dissent, that panel denied her relief because it was not clear or indisputable that § 2259 mandates restitution irrespective of proximate cause. *In re Amy,* 591 F.3d at 794-95. Amy sought rehearing and filed a separate notice of appeal from the district court's restitution order; her mandamus petition and appeal were consolidated. *See In re Amy Unknown,* 636 F.3d at 192-93. The panel assigned to hear Amy's appeal granted her rehearing request. *Id.* at 193. That panel then granted mandamus and rejected a requirement of proof of proximate cause in § 2259 because "[i]ncorporating a proximate causation requirement where none exists is a clear and indisputable error," but declined to reach the question of whether crime victims such as Amy have a right to an appeal. *Id.* at 193, 201. The panel remanded for the district court's entry of a restitution order. *Id.* at 201.

B

In *United States v. Wright,* 639 F.3d 679 (5th Cir. 2011), a separate panel of this court heard the appeal of Michael Wright ("Wright"). Like Paroline, Wright pled guilty to 18 U.S.C. § 2252 for possession of over 30,000 images of child pornography, which included

images of Amy's abuse.[4] The Government sought restitution for Amy under § 2259, supporting its request with the same psychiatric report Amy provided in Paroline's case. The district court awarded Amy $529,661 in restitution, explaining that "[t]his

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[4] Wright pled guilty pursuant to a plea agreement in which he generally waived his right to appeal but reserved his right to appeal "any punishment in excess of the statutory maximum." Wright's plea agreement stated that "the restitution provisions of Sections 3663 and 3663A of Title 18, United States Code will apply" and made no reference to § 2259. During the guilty plea colloquy, the district court restated the terms of the plea agreement regarding Wright's appeal waiver. The district court asked Wright if he understood all the rights he was waiving, and he responded that he did. The district court also asked Wright if he understood that he "also may be required to reimburse any victim for the amount of his or her loss under the Victim Restitution Law, if that term is applicable." Wright again said he understood.

The Government seeks to assert the appeal waiver Wright signed only if we hold that restitution is limited by proximate cause in all respects. It concedes, however, that Wright's appeal waiver would not be valid if the en banc court holds that § 2259 lacks a proximate cause requirement that covers all categories of losses because Wright did not waive his right to appeal a sentence unbounded by a proximate cause limitation. Because we hold today that § 2259's isolated "proximate result" language does not cloak all categories of losses with a proximate cause requirement, we need not further address the appeal waiver issue. We have repeatedly held that appeal waivers the Government does not seek to enforce are not self-enforcing and that the Government can effectively "waive the waiver." *See United States v. Acquaye*, 452 F.3d 380, 381 (5th Cir. 2006). Given the Government's concession and our holding on the substance of § 2259, we conclude that the Government is not seeking to enforce the appeal waiver in this case. Accordingly, we conclude that the appeal waiver does not bar Wright's appeal. *See id.*

amount was reached by adding the estimated costs of the victim's future treatment and counseling at $512,681.00 and the costs of the victim's expert witness fees at $16,980.00." *United States v. Wright*, No. 09-CR-103, at 5 (E.D. La. Dec. 16, 2009). The district court did not explain why it awarded no restitution for the other amounts that Amy had requested and made no reference to a proximate cause requirement. *See id.* Observing that Amy had been awarded restitution in another district court, the district court further explained that "[t]he restitution ordered herein is concurrent with any other restitution order either already imposed or to be imposed in the future payable to this victim." USCA5 R. 111-12. Wright appealed to contest the restitution order.

The *Wright* panel first found that the appeal waiver in Wright's plea agreement did not foreclose his right to appeal the restitution order. *Wright*, 639 F.3d at 683. Then, applying *Amy*'s holding, the Wright panel concluded that Amy was entitled to restitution but that the district court had given inadequate reasons for the award it assessed. *Id.* at 685-86. The panel remanded for further findings regarding the amount of the award. *Id.* at 686. The three members on the *Wright* panel, however, joined a special concurrence that questioned *Amy*'s holding and suggested that the court rehear both cases en banc, in part because this court was the first circuit to hold that a proximate cause requirement does not attach to the

"full amount of . . . losses" under § 2259(b)(3). *See id.* at 689-90, 692 (Davis, J., specially concurring).

This court held the mandates in both *Amy* and *Wright*. A majority of this court's members voted to rehear these opinions en banc to resolve the question of how to award restitution under § 2259 and to address other related questions raised by these appeals. *See In re Amy Unknown & United States v. Wright*, 668 F.3d 776 (5th Cir. 2012) (granting rehearing en banc).

II

In rehearing *Amy* and *Wright* en banc, we address the following issues: (1) whether the Crime Victims' Rights Act ("CVRA") grants crime victims a right to an appeal or, if not, whether this court should review Amy's mandamus petition under the standard this court has applied to supervisory writs; (2) whether 18 U.S.C. § 2259 requires the Government to show a defendant's criminal acts proximately caused a victim's injuries before a district court may award restitution; and (3) whether, in light of our holding with respect to § 2259, the district courts in *Amy* and *Wright* erred.

A

Amy petitioned for mandamus and, after this court initially denied her relief, appealed from the district court's restitution order. In the panel opinion

in *Amy*, this court granted her mandamus on rehearing under our traditional mandamus inquiry, which this court held in *In re Dean*, 527 F.3d 391, 394 (5th Cir. 2008) (per curiam), applies to appeals under the CVRA. *See Amy*, 636 F.3d at 197-98. In *Amy*, the panel declined to decide whether the CVRA entitled her to bring a direct appeal, *see id.* at 194-97, even though *Dean* seemingly foreclosed that argument. *See Dean*, 527 F.3d at 394 (rejecting victims' assertion that the standards governing an appeal apply on CVRA review). Amy asks the en banc court to construe the CVRA to guarantee crime victims the right of appeal and alternatively asks the court to hear her mandamus petition under our supervisory mandamus power, which would hold her mandamus petition to a less onerous standard of review than *Dean* requires.

1

The CVRA grants crime victims, including Amy, "[t]he right to full and timely restitution as provided in law," 18 U.S.C. § 3771(a)(6), and makes explicit that crime victims, their representatives, and the Government may move the district court to enforce that right. *Id.* § 3771(d)(1); *see id.* § 3771(e) (defining "crime victim" as "a person directly and proximately harmed as a result of the commission of a Federal offense."). The CVRA further commands that "[i]n any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded [this right]." *Id.* § 3771(b)(1). Where a

district court denies a victim relief, the CVRA provides that

> [T]he movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed.

Id. § 3771(d)(3); *see id.* § 3771(d)(5)(B) (requiring the victim to petition for mandamus within fourteen days). The CVRA further grants the Government, "[i]n any appeal in a criminal case," the authority to "assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates," *id.* § 3771(d)(4), and makes clear that "[n]othing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." *Id.* § 3771(d)(6).

Amy's argument effectively requires us to address two questions: first, whether the CVRA entitles crime victims to an appeal; and second, whether the CVRA entitles crime victims' mandamus petitions through the review standards governing an appeal. First, we observe that the plain text of the CVRA expressly grants crime victims only a right to mandamus relief and makes no mention of any right of crime victims to an appeal. *See* 18 U.S.C. § 3771(d)(3); *Dean*, 527 F.3d at 394. In contrast, the CVRA grants the Government the right to mandamus while also

retaining the Government's right to a direct appeal. *Id.* § 3771(d)(4) (allowing only the Government to "assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates."). In interpreting the statute, absent contrary indication, we presume that Congress "legislated against the background of our traditional legal concepts," *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437 (1978), including that crime victims have no right to appeal. *See Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (citing *United States ex rel. Louisiana v. Jack*, 244 U.S. 397, 402 (1917)) (explaining that "[t]he rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment.").

Amy fails to show any language in the statute that reflects Congress' intent to depart from this principle. Instead, she protests that before the CVRA's enactment, this court heard appeals from nonparties with a direct interest in aspects of criminal prosecutions and contends that this suggests that the crime victims retain a similar right to appeal under the CVRA. *See Amy*, 636 F.3d at 195-96 (discussing *United States v. Briggs*, 514 F.2d 794 (5th Cir. 1975); *United States v. Chagra*, 701 F.2d 354 (5th Cir. 1983)). The cases Amy cites, however, are unconvincing. They allowed non-parties to appeal discrete pre-trial issues with constitutional implications, which were unrelated to the merits of the criminal cases from which they arose. *See Briggs*, 514 F.2d at 799 (holding that persons named as unindicted co-conspirators in an indictment had standing to

challenge the power of a grand jury to charge them with criminal conduct without indicting them); *Chagra*, 701 F.2d at 360 (allowing newspapers and a reporter to appeal an order restricting their access to a pretrial bail reduction hearing). These cases do not stand for the proposition that this court has allowed victims any post-judgment right of appeal and, moreover, do not support the inference that Congress drafted the CVRA with the understanding that crime victims had any right to an appeal. Because nothing in the CVRA suggests that Congress intended to grant crime victims the right to an appeal or otherwise vary the historical rule that crime victims do not have the right of appeal, we conclude that the CVRA grants crime victims only mandamus review.[5]

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[5] Six of our sister circuits generally favor a reading of the statute that allows no appeal, and no circuit has expressly granted victims the right to an appeal under the CVRA. *See United States v. Alcatel-Lucent France, SA*, Nos. 11-12716, 11-12802, 2012 WL 3139014, at *5 (11th Cir. Aug. 3, 2012); *United States v. Monzel*, 641 F.3d 528, 533 (D.C. Cir.), *cert. denied, Amy, Victim in Misty Child Pornography Series v. Monzel*, 132 S. Ct. 756 (2011); *United States v. Aguirre-Gonzalez*, 597 F.3d 46, 53-56 (1st Cir. 2010); *In re Antrobus*, 519 F.3d 1123, 1128-30 (10th Cir. 2008); *Kenna v. U.S. Dist. Court*, 435 F.3d 1011, 1017 (9th Cir. 2006); *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555, 562-63 (2d Cir. 2005); *see also In re Acker*, 596 F.3d 370, 373 (6th Cir. 2010) ("[W]here the [purported victim's] direct appeal was filed at the same time as the [CVRA] mandamus petition and raises the identical issues, there is no additional right of appeal.").

Further supporting this conclusion is that under the Victim and Witness Protection Act ("VWPA"), the CVRA's predecessor in which restitution was optional rather than mandatory, at least

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Next, we consider whether the CVRA nonetheless requires appellate courts to apply the standard of review governing a direct criminal appeal to mandamus petitions, and conclude it does not. When assessing the meaning of the term "mandamus" in the CVRA, we presume that this "statutory term . . . ha[s] its common-law meaning," absent contrary indication. *Taylor v. United States*, 495 U.S. 575, 592 (1990). The Supreme Court has explained that "[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Kerr v. U.S. Dist. Court*, 426 U.S. 394, 402 (1976); *accord Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004). "[T]he writ has traditionally been used in the federal courts only . . . to compel it to exercise its authority when it is its

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one circuit court denied victims a right to any relief because "[n]owhere in the statute does Congress suggest that the VWPA was intended to provide victims with a private remedy to sue or appeal restitution decisions." *United States v. Mindel*, 80 F.3d 394, 397 (9th Cir. 1996). This same logic extends to limit the right of crime victims under the CVRA to only the mandamus relief that the statute clearly expresses. *See id.*

The cases Amy relies on, moreover, further disfavor allowing a § 1291 appeal. Any persuasive force that *In re Siler*, 571 F.3d 604, 608 (6th Cir. 2009) (allowing crime victims to appeal under § 1291 when they sought the use of a presentencing report in a subsequent civil suit), may have is undercut by the Sixth's Circuit later decision not to extend a right of appeal to a crime victim who simultaneously petitioned for mandamus relief. *See In re Acker*, 596 F.3d 370, 373 (6th Cir. 2010). Likewise, the Third Circuit's decision allowing a crime victim a § 1291 appeal, without any analysis, in *United States v. Kones*, 77 F.3d 66, 68 (3d Cir. 1996), also fails to convince us that allowing crime victims a § 1291 appeal is proper.

duty to do so." *Kerr*, 426 U.S. at 402 (quotation marks omitted). "[O]nly exceptional circumstances amounting to a judicial usurpation of power will justify the invocation of this extraordinary remedy." *Id.* (quotation marks omitted). Mandamus traditionally "is not to be used as a substitute for an appeal, or to control the decision of the trial court in discretionary matters." *Plekowski v. Ralston-Purina Co.*, 557 F.2d 1218, 1220 (5th Cir. 1977). Issuance of the writ is largely a matter of discretion with the court to which the petition is addressed. *See Schlagenhauf v. Holder*, 379 U.S. 104, 112 n.8 (1964).

Certain aspects of the CVRA convince us that Congress intended mandamus in its traditional sense when it selected the word "mandamus." *See Taylor*, 495 U.S. at 592. Reading the statute's provisions together, the CVRA seems to intentionally limit victims' right to review as an extraordinary remedy because it authorizes review only where a district court fails to fulfill a statutory duty; the statute does not extend victims' right to review to situations where a district court acts on a discretionary matter. *See Kerr*, 426 U.S. at 402. To explain, the CVRA lists eight rights that it ensures crime victims, including the right to restitution. 18 U.S.C. § 3771(a)(1)-(8). The restrictive statement, "A crime victim has the following rights," precedes the list of those rights and supports the conclusion that the CVRA's grant of rights is exclusive. *Id.* § 3771(a). And only where the district court denies a motion seeking to assert one of those rights does the CVRA allow a victim to seek the

review of an appellate court. *See id.* § 3771(d)(3). This limitation suggests that in granting relief, the district court retains discretion to select the appropriate means to ensure victims' rights, and that victims may only properly seek appellate intervention where the district court clearly fails to "exercise its authority when it is its duty to do so." *See Kerr*, 426 U.S. at 402; *see also Plekowski*, 557 F.2d at 1220 ("The remedy of mandamus . . . is not to be used . . . to control the decision of the trial court in discretionary matters."). Under this reading, only the Government would retain a right to appeal even seemingly discretionary actions, *see* 18 U.S.C. § 3771(d)(4), and could elect to appeal the district court's order to the extent it exercises its own prosecutorial discretion to do so. *See id.* § 3771(d)(6). If we were to instead read the CVRA as extending a right of appeal to victims, we would expand the rights granted to crime victims and simultaneously erode the CVRA's attempt to preserve the Government's discretion. *See id.* A reading of the statute that limits victims' appellate review to the traditional mandamus inquiry thus respects both the CVRA's preservation of the Government's and the district court's traditional discretion while safeguarding the limited rights the CVRA grants.

The very short timeline in which appellate courts must act, and the fact that a single circuit judge may rule on a petition, confirm the conclusion that Congress intended to limit crime victims' appellate relief under the CVRA to traditional mandamus review. *See* 18 U.S.C. § 3771(d)(3). These requirements reflect

that appellate courts must grant relief quickly, but rarely, as "a drastic remedy generally reserved for really 'extraordinary' cases." *In re E.E.O.C.*, 709 F.2d 392, 394 (5th Cir. 1983) (citing *Kerr*, 426 U.S. at 402).

Amy has failed to show that Congress intended to grant crime victims anything other than traditional mandamus relief under the CVRA.[6] While, as Amy

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[6] Amy nevertheless insists that the CVRA's requirements that the courts of appeals "take up and decide" a petition and "ensure that the crime victim is afforded" all his or her rights in a court proceeding support recognizing victims' right to an appeal and disfavor an interpretation that would provide for traditional mandamus review, which is typically discretionary. *See* 18 U.S.C. § 3771(b)(1), (d)(3). The requirement that appellate courts "take up and decide" a petition, however, relates directly to the short time period in which Congress directs appellate courts to act; this short time period, as we have already explained, favors, rather than opposes, the use of mandamus. *See supra*. Similarly, Amy fails to note that the command that federal courts "ensure that the crime victim is afforded" certain rights falls within a section labeled "In general." *See id.* § 3771(b)(1). Placed in context, this language merely reflects Congress' intention to make plain that federal courts must guard the specific, but necessarily limited, rights spelled out in the CVRA through the processes prescribed in its other subsections. This language does not suggest that the grant of mandamus in this context is not discretionary. Amy's arguments are unavailing.

Only two circuits support Amy's position that she is entitled to something more closely resembling direct appellate standards of review. With little analysis, the Second Circuit has concluded an abuse of discretion standard should govern CVRA mandamus petitions. *See In re W.R. Huff*, 409 F.3d at 562-63. That court divined a relaxed standard from the express terms of the statute and reasoned only that "[i]t is clear . . . that a petitioner seeking relief pursuant to the mandamus provision set forth in

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insists, it may be more difficult for a crime victim to enforce rights through mandamus than appeal, this

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§ 3771(d)(3) need not overcome the hurdles typically faced by a petitioner seeking review of a district court determination through a writ of mandamus." *Id.* at 562-63. The lack of reasoning accompanying the Second Circuit's use of a relaxed standard of review fails to convince us that anything other than traditional mandamus standards should govern our review of CVRA petitions.

The Ninth Circuit also has provided for relaxed review, focusing on legal error in reviewing a crime victim's mandamus petition under the CVRA. To justify this relaxed review, the Ninth Circuit emphasized that "[t]he CVRA explicitly gives victims aggrieved by a district court's order the right to petition for review by writ of mandamus, provides for expedited review of such a petition, allows a single judge to make a decision thereon, and requires a reasoned decision in case the writ is denied." *Kenna*, 435 F.3d at 1017. But a later decision suggests that the Ninth Circuit's interpretation in *Kenna* was influenced by the facts of that case and a desire to reach a question of law that its traditional mandamus inquiry would not have allowed; in that later case, the Ninth Circuit explained that it applies its normal test to CVRA mandamus petitions, and merely emphasizes the question of legal error in assessing a crime victim's right to relief. *See In re Andrich*, 668 F.3d 1050, 1051 (9th Cir. 2011) (per curiam).

While Amy asserts that two additional circuits favor her position, those courts have not clearly accepted her position, and it is unclear that they would do so if presented with the opportunity to fully analyze the legal issues this question presents. *See In re Stewart*, 552 F.3d 1285 (11th Cir. 2008) (granting mandamus on question of whether a person was a crime victim who could participate in district court proceedings without reviewing traditional mandamus factors); *In re Walsh*, 229 F. App'x 58, 60-61 (3d Cir. 2007) (in dicta, agreeing with the Second and Ninth Circuits that "mandamus relief is available under a different, and less demanding, standard under 18 U.S.C. § 3771 in the appropriate circumstances.").

limitation reflects the express language of the statute and honors the common law tradition in place when the CVRA was drafted.

2

Our conclusion that the CVRA does not provide crime victims with appellate review does not foreclose Amy's somewhat different request that we apply our supervisory mandamus power of review to her mandamus petition, which would lower the hurdles to relief under mandamus. *See In re McBryde,* 117 F.3d 208, 223 (5th Cir. 1997) (acknowledging that "courts of appeals have possessed the power to issue supervisory writs of mandamus in order to prevent practices posing severe threats to the proper functioning of the judicial process"); *In re E.E.O.C.,* 709 F.2d at 395 (in allowing a supervisory writ to proceed as a one-time-only device, this court advised it would only grant the writ if "there is 'usurpation of judicial power' or a clear abuse of discretion" and the movant showed it had a clear and indisputable right to a writ) (quoting *Schlagenhauf,* 379 U.S. at 110). Even so, we need not resolve this question. Our traditional inquiry suffices to afford Amy the relief she requests. *See* IV-A *infra*. *Cf. Aguirre-Gonzalez,* 597 F.3d at 53-56 (declining to settle question of standard of review because neither the traditional mandamus standard nor a more relaxed standard would afford relief in the circumstances of that case).

Because we hold that the CVRA entitles Amy to only mandamus relief, we dismiss her appeal. Under our traditional mandamus inquiry, we will grant Amy's requested mandamus only if (1) she has no other adequate means to attain the desired relief; (2) she has demonstrated a clear and indisputable right to the issuance of a writ; and (3) in the exercise of our discretion, we are satisfied that the writ is appropriate. *See Dean,* 527 F.3d at 394.

B

Wright appeals from the district court's restitution order. This court reviews the legality of the restitution order de novo. *United States v. Arledge,* 553 F.3d 881, 897 (5th Cir. 2008). If the restitution order is legally permitted, we then review the amount of the order for an abuse of discretion. *Id.*; *United States v. Ollison,* 555 F.3d 152, 164 (5th Cir. 2009).

III

To resolve Amy's mandamus petition and Wright's appeal, we must first ascertain the level of proof required to award restitution to Amy and crime victims like her under 18 U.S.C. § 2259. The parties' dispute turns on the interpretation and effect of the words "proximate result" in § 2259(b)(3)(F).

A

Our analysis again begins with the text of the statute. *See Watt*, 451 U.S. at 265; *In re Rogers*, 513 F.3d 212, 225 (5th Cir. 2008). If § 2259's language is plain, our "sole function" is to "enforce it according to its terms" so long as "the disposition required by the text is not absurd." *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) (internal quotation marks omitted); *see also Bates v. United States*, 522 U.S. 23, 29 (1997) (holding that courts "ordinarily" should "resist reading words or elements into a statute that do not appear on its face."). The Supreme Court has explained that "[s]tatutory construction 'is a holistic endeavor.'" *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) (quoting *United Savings Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988)). "This Court naturally does not review congressional enactments as a panel of grammarians; but neither do we regard ordinary principles of English prose as irrelevant to a construction of those enactments." *Flora v. United States*, 362 U.S. 145, 150 (1960). Although "the meaning of a statute will typically heed the commands of its punctuation[,] . . . a purported plain-meaning analysis based only on punctuation is necessarily incomplete." *Bank of Or.*, 508 U.S. at 454. "[A]t a minimum," our analysis "must account for a statute's full text, language as well as punctuation, structure, and subject matter." *Id.* at 455.

Only after we apply principles of statutory construction, including the canons of construction, and

conclude that the statute is ambiguous, may we consult legislative history. *Carrieri v. Jobs.com, Inc.*, 393 F.3d 508, 518-19 (5th Cir. 2004). For statutory language to be ambiguous, however, it must be susceptible to more than one reasonable interpretation or more than one accepted meaning. *Id.* at 519. Where "the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

The language of 18 U.S.C. § 2259 reflects a broad restitutionary purpose. *See United States v. Laney*, 189 F.3d 954, 966 (9th Cir. 1999) ("Section 2259 is phrased in generous terms, in order to compensate the victims of sexual abuse for the care required to address the long term effects of their abuse."); *United States v. Crandon*, 173 F.3d 122, 126 (3d Cir. 1999) ("Congress [in § 2259] mandated broad restitution for a minor victim."). Section 2259(a) mandates that district courts "shall order restitution for any offense under this chapter," including the offense to which Paroline and Wright pled guilty, 18 U.S.C. § 2252. Section 2259(b)(1) specifies that a restitution order "shall direct the defendant to pay the victim . . . the full amount of the victim's losses."[7]

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[7] A "victim" is an "individual harmed as a result of a commission of a crime under this chapter." *Id.* § 2259(c).

Section 2259(b)(3) defines the term "the full amount of the victim's losses," contained in § 2259(b)(1), as

> [A]ny costs incurred by the victim for –
>
> (A) medical services relating to physical, psychiatric, or psychological care;
>
> (B) physical and occupational therapy or rehabilitation;
>
> (C) necessary transportation, temporary housing, and child care expenses;
>
> (D) lost income;
>
> (E) attorneys' fees, as well as other costs incurred; and
>
> (F) any other losses suffered by the victim as a proximate result of the offense.

Section 2259(b)(4) reinforces that "[t]he issuance of a restitution order under this section is mandatory," *id.* § 2259(b)(4)(A), and instructs that "[a] court may not decline to issue an order under this section because of – (i) the economic circumstances of the defendant; or (ii) the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source." *Id.* § 2259(b)(4)(B). To guide the district courts in awarding restitution, § 2259(b)(2) instructs courts to issue and enforce restitution orders "in accordance with section 3664 and in the same manner as an order under 3663A."

B

The district court in *Paroline* rejected Amy's argument that § 2259 requires an award of "the full amount of [her] losses." Instead, resorting to the Supreme Court's decision in *Porto Rico Railway, Light & Power Co. v. Mor*, 253 U.S. 345, 348 (1920), which explained that "[w]hen several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all," the district court extended the "proximate result" language contained in § 2259(b)(3)(F) to apply to the losses described in subsections (A) through (E). *See Paroline*, 672 F. Supp. 2d at 788 (also citing *Fed. Mar. Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 734 (1973)). In construing the statute, the district court expressed its concern that "a restitution order under section 2259 that is not limited to losses proximately caused by the defendant's conduct would under most facts, including these, violate the Eighth Amendment," *id.* at 789, and that an alternative "interpretation would be plainly inconsistent with how the principles of restitution and causation have historically been applied." *Id.* at 790. In reversing the district court's holding, the *Amy* panel rejected a generalized proximate cause requirement and stressed that the causation requirement in the definition of "victim," together with § 3664's mechanism for joint and several liability, surmounts any Eighth Amendment concerns. *See Amy*, 636 F.3d at 200-01.

Unlike the district court in *Paroline*, the *Wright* district court seemed to accept Amy's argument to a limited degree, as it awarded all of the restitution she requested for her future treatment and counseling, and the costs of her expert witness fees. Although the *Wright* panel accepted *Amy*'s holding as binding precedent in reviewing the district court's restitution award, *Wright*'s special concurrence, tracing the reasoning of the district court in *Amy* and challenging the panel's decision not to limit § 2259 to damages proximately caused by a defendant's criminal actions, presaged this en banc rehearing. *See Wright*, 639 F.3d at 686-89 (Davis, J., specially concurring).

In this en banc rehearing, Amy maintains that § 2259 is a mandatory statute requiring district courts to award full restitution to victims of child pornography. In her view, the plain language of the statute dictates that the proximate result language in § 2259(b)(3)(F) is limited to that category of losses and does not apply to the categories of losses described in § 2259(b)(3)(A)-(E).

The Government contends that § 2259(b)(3) conditions all of a victim's recoverable losses on a showing that those losses proximately resulted from the offense. Drawing on *Porto Rico Railway*, the Government asserts that the statutory text reflects Congress' intent to condition all recoverable losses on a showing of proximate cause. Without citing to precedent, the Government urges us "to presume that Congress adhered to the usual balance in the law of remedies: to hold defendants fully accountable for the

losses associated with their conduct but in a manner that respects the deeply-rooted principle of proximate causation." The Government further asserts that there is nothing absurd in the conclusion that Congress intended this limiting principle to apply to all categories of losses. Invoking a recent Supreme Court case analyzing civil tort liability under the Federal Employers' Liability Act in support of this proposition, the Government reasons that "the very purpose of a proximate-cause limitation is to prevent infinite liability." *See CSX Transp., Inc., v. McBride,* 131 S. Ct. 2630, 2642 (2011). The Government advises the court not to delve into legislative materials and also stresses that seven circuits have rejected Amy's reading of the statute.

Paroline similarly construes the "proximate result" language in the statute and relies on the construction of other restitution statutes to support his position. Both Paroline and Wright draw on legislative materials to assert that in drafting § 2259, Congress intended to incorporate a proximate cause requirement.[8]

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[8] Of course, we cannot consult these materials unless we conclude that § 2259's text is ambiguous. *See Carrieri,* 393 F.3d at 518-19. Even if we were to consult these materials, they are inconclusive at best.

C

1

Our plain reading of § 2259 leads us to the following conclusion: Once a district court determines that a person is a victim, that is, an "individual harmed as a result of a commission of a crime" under the chapter that relates to the sexual exploitation and abuse of children, § 2259 requires the district court to order restitution for that victim. *See* 18 U.S.C. § 2259(a), (b)(4)(A), (c). The restitution order that follows must encompass "the full amount of the victim's losses." *Id.* § 2259(b)(1). Those losses include five categories of specific losses – medical services related to physical, psychiatric, or psychological care; physical and occupational therapy or rehabilitation; necessary transportation, temporary housing, and childcare expenses; lost income; and attorney's fees and costs – and one category of "other losses suffered by the victim as a proximate result of the offense." *Id.* § 2259(b)(3). The rule of the last antecedent, recently applied by the Supreme Court in *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003), instructs that "a limiting clause or phrase," such as the "proximate result" phrase in § 2259(b)(3)(F), "should ordinarily be read as modifying only the noun or phrase that it immediately follows." "[T]his rule is not an absolute and can assuredly be overcome by other indicia of meaning," but "construing a statute in accord with the rule is 'quite sensible as a matter of grammar.'" *Id.* (quoting *Nobelman v. Am. Sav. Bank*, 508 U.S. 324, 330 (1993)); *accord* ANTONIN SCALIA & BRYAN A. GARNER,

READING LAW: THE INTERPRETATION OF LEGAL TEXTS 144 (2012) ("This rule is the legal expression of a commonsense principle of grammar").

The structure and language of § 2259(b)(3) limit the phrase "suffered by the victim as a proximate result of the offense" in § 2259(b)(3)(F) to the miscellaneous "other losses" contained in that subsection. We see no "other indicia of meaning" in the statute to suggest that the rule of the last antecedent does not apply here. *See id.* Despite the clear terms of the statute, other courts and the parties before us raise arguments in favor of a generalized proximate cause requirement based on (a) canons of statutory construction, (b) traditional causation principles, and (c) possible absurd results. We address – and dismiss – each in turn.

a

First, the Government, Paroline, Wright, and Judge Davis's dissenting opinion press the importance of *Porto Rico Railway* and other caselaw relied on by the district court. As did the *Amy* panel, however, we doubt *Porto Rico Railway*'s applicability here. *Porto Rico Railway* concerned the following statute: "Said District Court shall have jurisdiction of all controversies where all of the parties on either side of the controversy are citizens or subjects of a foreign state or states, or citizens of a state, territory, or district of the United States not domiciled in Porto Rico. . . ." *Porto Rico Ry.*, 253 U.S. at 346. The

Supreme Court read the words, "not domiciled in Porto Rico," to apply equally to "citizens or subjects of a foreign state or states" and "citizens of a state, territory, or district of the United States." *Id.* at 348. The Supreme Court explained, "When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." *Id.* at 348.

Deprived of its context, *Porto Rico Railway*'s rule can be contorted to support the statutory interpretation urged by the Government and apply the "proximate result" language in § 2259(b)(3)(F) to the five categories of loss that precede it. But applying that rule here to require generalized proximate cause would disregard that the list in *Porto Rico Railway*'s statute is significantly different than the one central to this appeal. The statute analyzed in *Porto Rico Railway* featured a long sentence, unbroken by numbers, letters, or bullets, with two complex noun phrases sandwiching the conjunction "or," with the modifier "domiciled in Porto Rico" following the conjoined phrases. The structure of the sentence required the reading the Supreme Court gave it; the phrase "domiciled in Porto Rico" modified the nouns at the head of the two phrases, "citizens or subjects" and "citizens." The Supreme Court expressed its concern that a different construction would have left the reader with a fragmented phrase, which would be overly broad in application, and which, in turn, would have failed to satisfy the statute's overarching

purpose to curtail federal courts' jurisdiction. *See Porto Rico Ry.*, 253 U.S. at 348.

Section 2259, in contrast, begins with an introductory phrase composed of a noun and verb ("'full amount of the victim's losses' includes any costs incurred by the victim for – ") that feeds into a list of six items, each of which are independent objects that complete the phrase. Only the last of these items contains the limiting language "proximate result." A double-dash opens the list, and semi-colons separate each of its elements, leaving § 2259(b)(3) with a divided grammatical structure that does not resemble the statute in *Porto Rico Railway*, with its flowing sentence that lacks any distinct separations. Of course, we do not sit "as a panel of grammarians," *Flora*, 362 U.S. at 150, but we cannot ignore that "the meaning of a statute will typically heed the commands of its punctuation." *Bank of Or.*, 508 U.S. at 454. The structural and grammatical differences between § 2259 and the statute in *Porto Rico Railway* forcefully counsel against applying *Porto Rico Railway* to the current statute to reach the *Paroline* district court's reading.[9]

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[9] Further, *Porto Rico Railway* also commands that where the statute in question "manifests a general purpose . . . [and] the application of the clause were doubtful, we should so construe the provision as to effectuate the general purpose of Congress." 253 U.S. at 348. The grammar of § 2259, viewed in light of § 2259's broad restitutionary purpose as expressed by its plain terms, confirms that our reading is correct. *See Crandon*, 173 F.3d at 126 ("Congress [in § 2259] mandated

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Seatrain, the other case relied on by the district court, is similarly inapplicable. *See Seatrain*, 411 U.S. at 726. *Seatrain* analyzed a federal antitrust statute that included a seven-category list. *Id.* at 732. All items on the list but the third referred to ongoing activity; the seventh category was a catchall category phrased as "or in any manner providing for an exclusive, preferential, or cooperative working arrangement." *Id.* at 732-33. The Government urged the Supreme Court to construe this third category as concerning a one-time activity. *Id.* at 732. The Court rejected that argument because a broad reading of the statute would conflict with the legal principle that antitrust laws are strictly construed. *Id.* at 733. To aid in a narrow construction of the statute, the Court applied the rule of statutory construction that "[catchall] clauses are to be read as bringing within a statute categories similar in type to those specifically enumerated" and concluded that the last catchall phrase indicated that Congress intended all the activities to penalize only ongoing antitrust activities. *Id.* at 734 (citing 2 J. SUTHERLAND, STATUTES & STATUTORY CONSTRUCTION § 4908 *et seq.* (3d ed. 1943)). Here, we do not face a statutory scheme that requires narrow construction. *See Crandon*, 173 F.3d at 126;

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broad restitution for a minor victim."); *Laney*, 189 F.3d at 966 ("Section 2259 is phrased in generous terms, in order to compensate the victims of sexual abuse for the care required to address the long term effects of their abuse.").

Laney, 189 F.3d at 966. *Seatrain*'s weight in interpreting § 2259 is questionable at best.

Seatrain's rule is at odds with the rule of last antecedent on which we rely; the rule of last antecedent, moreover, provides a reading faithful to § 2259's broad restitutionary purpose. To illustrate, in *Barnhart v. Thomas*, the Supreme Court reviewed an agency's interpretation of a statute that states

> An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do *his previous work* but cannot, considering his age, education, and work experience, engage in *any other kind of substantial gainful work* which exists in the national economy.

Barnhart, 540 U.S. at 23 (emphases added). Applying the rule of the last antecedent, the Supreme Court held that the words "which exists in the national economy" referred only to the noun "any other kind of substantial gainful work" and not to the noun "his previous work." *Id.* at 24-27. In support of this holding, the Supreme Court reasoned that the words "any other" in the second phrase did not show the "contrary intention" necessary to overcome the rule of the last antecedent to apply that phrase to the first. *Id.* at 27-28.

The Supreme Court also applied the rule of last antecedent in *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335 (2005) to a statute that

included a complete sentence that fed into a seven-category list. Each category on the list was punctuated with a period; only the last category on the list contained a limiting clause. *Id.* at 340. Drawing on the grammatical structure of the list, the Supreme Court concluded that applying the limiting clause to the other items in the list "stretches the modifier too far."[10] *Id.* at 343.

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[10] In *Barnhart*, Justice Scalia provided an example of application of this rule in ordinary life that reveals the commonsensical aspect of the error in applying the proximate result language of § 2259(b)(3)(F) to the five categories of losses that precede it:

> Consider, for example, the case of parents who, before leaving their teenage son alone in the house for the weekend, warn him, "You will be punished if you throw a party or engage in any other activity that damages the house." If the son nevertheless throws a party and is caught, he should hardly be able to avoid punishment by arguing that the house was not damaged. The parents proscribed (1) a party, and (2) any other activity that damages the house. As far as appears from what they said, their reasons for prohibiting the home-alone party may have had nothing to do with damage to the house-for instance, the risk that underage drinking or sexual activity would occur. And even if their only concern was to prevent damage, it does not follow from the fact that the same interest underlay both the specific and the general prohibition that proof of impairment of that interest is required for both. The parents, foreseeing that assessment of whether an activity had in fact "damaged" the house could be disputed by their son, might have wished to preclude all argument by specifying and categorically

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As we have already explained, the grammatical structure of § 2259(b)(3) reflects the intent to read each category of loss separate from the one that preceded it and limit the application of the "proximate result" language in § 2259(b)(3)(F). Comparing the Supreme Court's more recent articulations of the rule of the last antecedent in *Barnhart* and *Jama* to the older rules of statutory construction expressed in *Porto Rico Railway* and *Seatrain* confirms that application of the rule of the last antecedent to limit the proximate result language to the subsection in which it is contained makes more sense here. *See id.* at 26. Applying the proximate result language of § 2259(b)(3)(F) to the categories that precede it would "stretch[ ] the modifier too far" and disregard the structure of § 2259(b)(3) as written. *Jama*, 543 U.S. at 343.

At least three circuits agree that under rules of statutory construction, we cannot read the "proximate result" language in § 2259(b)(3)(F) as applying to the categories of losses in § 2259(b)(3)(A)-(E).[11] *See United States v. Burgess*, 684 F.3d 445, 456-57 (4th Cir. 2012); *United States v. Aumais*, 656 F.3d 147, 153

> prohibiting the one activity-hosting a party-that was most likely to cause damage and most likely to occur.

450 U.S. at 27-28.

[11] These circuits, whose approach we discuss later in this opinion, nevertheless inject the statute with a proximate cause requirement through alternative means. *See Monzel*, 641 F.3d at 535; *Aumais*, 656 F.3d at 153.

(2d Cir. 2011); *United States v. Monzel*, 641 F.3d 528, 535 (D.C. Cir.), *cert. denied, Amy, Victim in Misty Child Pornography Series v. Monzel*, 132 S.Ct. 756 (2011). But we do not ignore that other circuits have used tools of statutory construction to conclude that the proximate result language in § 2259(b)(3)(F) applies to the five categories of loss that preceded it.[12] *See United States v. McDaniel*, 631 F.3d 1204, 1208-09 (11th Cir. 2011); *United States v. Laney*, 189 F.3d 954, 965 (9th Cir. 1999). These circuits, however, reached this conclusion for reasons we do not find compelling. The Eleventh Circuit, for example, applied *Porto Rico Railway*'s rule without accounting for

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[12] This disagreement does not mean that our plain-meaning analysis is fraught with any ambiguity. This court considers a statute ambiguous when a statute is subject to more than one reasonable interpretation or more than one accepted meaning. *See Carrieri*, 393 F.3d at 518-19. Even though we choose a course that differs from that of our sister circuits, a division of judicial authority is not enough to render a statute ambiguous. *See Reno v. Koray*, 515 U.S. 50, 64-65 (1995) (discussing this principle in context of rule of lenity). Any "seeming agreement on a standard [in our sister circuits] suggests more harmony than there is." *United States v. Kearney*, 672 F.3d 81, 96 (1st Cir. 2012). The First Circuit has correctly observed that the various circuits have applied a proximate cause test to similar, if not identical facts, yet reached differing outcomes that "cannot be entirely explained by differences in the facts of record." *See id. Compare Monzel*, 641 F.3d at 537-40 (concluding that proximate cause shown but remanding to determine the amount of harm so caused) and *McDaniel*, 631 F.3d at 1209 (holding that the district court did not clearly err in finding proximate cause) *with McGarity*, 669 F.3d at 1267-70 (concluding that proximate cause was not established), *Aumais*, 656 F.3d at 154-55 (same), and *Kennedy*, 643 F.3d at 1263-65 (same).

the Supreme Court's application of it. *See* § IV-C-1-a *supra* (exposing the fault in relying on the rule of *Porto Rico Railway*). The Ninth Circuit, moreover, read the "as a result of" language in § 2259's definition of victim together with the "proximate result" language in § 2259(b)(3)(F) to infuse all of § 2259(b)(3) with a proximate cause requirement. *See Laney*, 189 F.3d at 965. Without more in the statute to support that analysis, we cannot accept the Ninth Circuit's conclusion. To do so would contradict the statute's plain terms and be tantamount to judicial redrafting. *See United States v. Naftalin*, 441 U.S. 768, 773 (1979) ("The short answer is that Congress did not write the statute that way."). The rules of statutory construction, properly applied, cannot be used to extend the proximate result language contained in § 2259(b)(3)(F) to the categories of losses preceding it.[13]

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[13] The dissenting opinion authored by Judge Davis criticizes the majority analysis's inconsistency with *Porto Rico Railway*. Like the Eleventh Circuit, however, Judge Davis's dissent fails to properly account for the statute in that opinion and § 2259's significantly differing contexts. Like the Ninth Circuit, this dissenting opinion attempts to cloak the entire statute with a proximate causation requirement with only scant and scattered causal language as support; the dissenting opinion also resorts to language that applies to the procedures with which restitution is issued and enforced within § 3664 to improperly bolster its position. While making the same errors as our sister circuits, the dissenting opinion does not explain why the rule of last antecedent does not apply. Its position is ultimately unpersuasive.

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Next, we consider the Government's assertion that principles of tort liability limit the award of restitution under § 2259 to losses proximately caused by a defendant's criminal actions. At least three of our sister circuits have accepted this view and derived a

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Judge Southwick's dissenting opinion does not agree with Judge Davis's analysis, but it would similarly resort to the language of § 3664 and § 3663A to require proximate causation. The dissenting opinions are correct that § 2259 directs that "[a]n order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A." Judge Southwick's dissenting opinion construes this language to require application of § 3663A's definition of victim as "a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered." Congress' directive to rely on the procedures guiding issuance and enforcement of a restitution order, however, does not require us to rely on the substantive definition of "victim" contained in a separate statute when § 2259 has already supplied courts with a different, broader definition of victim.

Lastly, Judge Davis's dissenting opinion claims that under our holding, "if Amy were injured in an automobile accident on the way to a counseling session, those damages would be included in a restitution award." This is not what the majority opinion suggests. Rather, the majority refuses to artificially divide responsibility for a crime victim's losses in circumstances like these here, where multiple defendants are realistically responsible for the victim's indivisible injury. While the dissent attempts to correct this error by adopting a collective causation theory, in doing so, it resorts to an unnecessary source in order to graft upon the clearly-worded statute a causation requirement. Ultimately the dissenting opinion's errors arises from its confusion of the "victim" inquiry which is antecedent to the calculation of "total losses."

proximate cause requirement not from "the catch-all provision of § 2259(b)(3)(F), but rather [from] traditional principles of tort and criminal law and [from] § 2259(c)'s definition of 'victim' as an individual harmed 'as a result' of the defendant's offense." *Monzel*, 641 F.3d at 535; *accord Burgess*, 2012 WL 2821069, at *10; *Aumais*, 656 F.3d at 153; *see Kearney*, 672 F.3d at 96-97 ("It is clear to us that Congress intended some causal link between the losses and the offense to support the mandated restitution."); *United States v. Evers*, 669 F.3d 645, 659 (6th Cir. 2012) (adopting a proximate cause requirement but declining to decide between the two approaches of our sister circuits).

In *United States v. Monzel*, a case that has served as a springboard for other circuits evaluating § 2259, the D.C. Circuit explained that "[i]t is a bedrock rule of both tort and criminal law that a defendant is only liable for harms he proximately caused," and "a restitution statute [presumably] incorporates the traditional requirement of proximate cause unless there is good reason to think Congress intended the requirement not to apply." *Monzel*, 641 F.3d at 535-36 (footnote omitted) (citing WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 6.4, at 464, 471 (2d ed. 2003)). The D.C. court posited that "[a]lthough § 2259 is a criminal statute, it functions much like a tort statute by directing the court to make a victim whole for losses caused by the responsible party," *see id.* at 536 n.5, and found nothing in the text of § 2259 indicating Congress' intent to eliminate "the ordinary

requirement of proximate cause." *Id.* at 536. Rather, "[b]y defining 'victim' as a person harmed 'as a result of' the defendant's offense,'" the court inferred that "the statute invokes the standard rule that a defendant is liable only for harms that he proximately caused." *Id.* The D.C. Circuit worried that without such a limitation, "liability would attach to all sorts of injuries a defendant might indirectly cause, no matter how 'remote' or tenuous the causal connection." *Id.* at 537.

The D.C. Circuit rejected the view expressed by the *In re Amy Unknown* panel, explaining that "[h]ad Congress meant to abrogate the traditional requirement for everything but the catch-all, surely it would have found a clearer way of doing so." *Id.* at 536-37. The D.C. Circuit criticized this court's decision in *Amy* because "a 'general' causation requirement without a subsidiary proximate causation requirement is hardly a requirement at all"; "[s]o long as the victim's injury would not have occurred but for the defendant's offense, the defendant would be liable for the injury." *Id.* at 537 n.8. The circuits that have adopted the D.C. Circuit's view have pursued a similar line of reasoning. We do not accept this reasoning, however, and refuse to inject the statute with a proximate cause requirement based on traditional principles of liability.

The Supreme Court has explained that we "ordinarily" should "resist reading words or elements into a statute that do not appear on its face." *Bates*, 522 U.S. at 29. But the Supreme Court has also explained

that the absence of certain language in a statute does not necessarily mean that Congress intended courts to disregard traditional background principles. *See U.S. Gypsum Co.*, 438 U.S. at 437. To illustrate, with respect to the question of intent in the criminal provisions of the Sherman Act, the Supreme Court has explained that

> "[M]ere omission . . . of intent [in the statute] will not be construed as eliminating that element from the crimes denounced"; instead Congress will be presumed to have legislated against the background of our traditional legal concepts which render intent a critical factor, and "absence of contrary direction [will] be taken as satisfaction with widely accepted definitions, not as a departure from them."

Id. at 437 (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952)). In interpreting the omission of intent in a different statute, the Supreme Court cautioned that "far more than the simple omission of the appropriate phrase from the statutory definition [of the offense] is necessary to justify dispensing with" a mens rea requirement. *Liparota v. United States*, 471 U.S. 419, 426 (1985) (quoting *U.S. Gypsum*, 438 U.S. at 438); *see id.* ("[T]he failure of Congress explicitly and unambiguously to indicate whether mens rea is required does not signal a departure from this background assumption of our criminal law.").

With these principles in mind, the D.C. Circuit's analysis, which infuses § 2259 with a generalized proximate cause requirement, *see Monzel,* 641 F.3d at 535, could comport with the Supreme Court's interpretative guidance – only if § 2259 were naked of causal limitations. *See U.S. Gypsum Co.,* 438 U.S. at 437. But it is not. In assessing whether Congress intended a broad proximate cause limitation, we cannot ignore that § 2259 expresses causal requirements, yet isolates them to two discrete points: the definition of victim as an "individual harmed *as a result of* a commission of a crime," and the limitation of "any other losses" to those that are the "*proximate result* of the offense." *See* 18 U.S.C. § 2259(b), (c) (emphases added). Had Congress omitted all causal language and not required award of the full amount of losses, or positioned the proximate result language so that it would apply to all categories of losses, we could consider the possibility that Congress intended to bind all categories of losses with a proximate cause requirement. Instead, Congress resisted using the phrase "proximate cause" anywhere in § 2259, including § 2259(b)(3)(F) and further required the court to order the "full amount of the victim's losses."[14] *See id.*

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[14] In stark contrast, other restitution statutes contain more forceful causation requirements that are lacking in § 2259. *Compare* 18 U.S.C. § 3663A(a)(2) (explaining that a victim is "a person directly and proximately harmed as a result of the commission of an offense") *with id.* § 2259(c) (defining a victim as "the individual harmed as a result of a commission of a crime").

The selective inclusion and omission of causal requirements in § 2259's subsections, together with language pointing away from ordinary causation, suggest that Congress intended to depart from, rather than incorporate, a tradition of generalized proximate cause.

This interpretation does not render the statute unworkable. The problem seeming to animate the cases in other circuits interpreting § 2259 to require proximate cause is how to allocate responsibility for a victim's harm to any single defendant. *See Burgess,* 2012 WL 2821069, at *12; *Aumais,* 656 F.3d at 153-54; *Kennedy,* 643 F.3d at 1265-66; *Monzel,* 641 F.3d at 537-40. These courts ignore, however, that deciding that a defendant "must pay restitution for the losses he caused (whether proximately or not)," does not resolve how the court "determines how those losses should be allocated in cases where more than one offender caused them" – injecting the statute with traditional proximate causation limitations takes courts no closer to determining what each defendant must pay or to supplying crime victims with the "full amount of [their] losses." *Burgess,* 2012 WL 2821069, at *14 (Gregory, J., concurring in part, dissenting in part, and concurring in judgment) ("The question of whether a defendant proximately caused some injury is entirely separate from the question of how those proximately caused losses should be allocated among several offenders."). By focusing on the question of proximate cause, our sister circuits have not made § 2259 any easier to apply and seemingly have

ignored that § 2259 has armed courts with tools to award restitution because it instructs courts to refer to the standards under § 3664.[15] *See id.* § 2259(b)(2) ("An order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A.").

Section 3664 instructs that courts may enforce a restitution order "by all other available and reasonable means," *id.* § 3664(m)(1)(A)(ii), and offers a "means" to aid courts in awarding restitution in a way that would ensure that Amy receives the full amount of her losses, to the extent possible, while

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[15] Any possible difficulty in ordering restitution in these cases arises not from the statutory construction, but from the type of crime underlying these appeals. It is quite possible that no other crime is like the crime of distribution, receipt, and possession of child pornography punishable under § 2252: No other crime involves single victims harmed jointly by defendants acting independently in the country. *See Burgess*, 2012 WL 2821069, at *13 (Gregory, J., concurring in part, dissenting in part, and concurring in judgment) (discussing the indivisibility of the injury to victims of child pornography crimes). Yet, the unique factual scenario that undergirds the application of this restitution statute need not muddle our analysis. We cannot interpret this statute to reach a result unsupported by its plain terms. *See Germain*, 503 U.S. at 254 (quoting *Rubin*, 449 U.S. at 430) (explaining that where "the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'"); *see also In re Amy*, 591 F.3d at 797 (Dennis, J., dissenting) ("Congress intended to afford child victims ample and generous protection and restitution, not to invite judge-made limitations patently at odds with the purpose of the legislation.").

also ensuring that no defendant bears more responsibility than is required for full restitution: joint and several liability. Where "the court finds more than 1 defendant has contributed to the loss of a victim," § 3664(h) instructs that "the court may make each defendant liable for payment of the full amount of restitution."[16] The joint and several liability mechanism

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[16] As Judge Davis's dissenting opinion points out, § 3664(h) fully reads:

> If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution *or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant.*

(emphasis added).

Judge Davis's dissenting opinion would read the italicized portion of 3664(h) to allow district courts the discretion to circumvent § 2259's command to award a crime victim the full amount of his or her losses. Thus, § 2259 dictates that the circumstances underlying child pornography convictions under § 2252 do not permit division of liability for reasons this opinion has already explained; the injury victims like Amy suffer does not produce a loss capable of division. *See* note 14 *supra*. We echo the criticism of this approach embodied in Judge Southwick's dissenting opinion:

> In light of the unique nature of prosecutions of child pornography and the clear congressional intent to maximize awards, any doubts about the proper amount of restitution should be resolved in favor of the child. . . . I am concerned that [Judge Davis's] emphasis on the discretion of a district court . . . tends towards accepting inappropriately low, even nominal awards. I would not accept that a forward-looking estimate of the number of future defendants and awards

(Continued on following page)

applies well in these circumstances, where victims like Amy are harmed by defendants acting separately who have caused her a single harm.[17] *See Burgess*, 2012 WL 2821069, at *13 (Gregory, J., concurring in part, dissenting in part, and concurring in judgment) (explaining that the joint and several liability described in § 3664 "'has long been available . . . in which two negligent actors, acting independently of one another, caused by a single indivisible harm to the plaintiff.'" (quoting TORT LAW: RESPONSIBILITIES AND REDRESS 517 (John C.P. Goldberg et al. eds., 2008)). And although the D.C. Circuit has expressed that it is "unclear . . . whether joint and several liability may be imposed upon defendants in separate cases," *Monzel*, 641 F.3d at 539, nothing in § 3664 forbids it, either expressly or through implication; the

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should be used to estimate a percentage of overall liability to be given a particular defendant. That puts too much weight on the interests of the defendants. Overcompensation is an unlikely eventuality.

[17] Writing separately in the Fourth Circuit's recent opinion analyzing § 2259, Judge Gregory explained the indivisibility of pornography victims' harms:

> If [a defendant] proximately caused [a victim like Amy]'s psychological injury, this injury is indivisible from the psychological injuries proximately caused by the other offenders. I do not believe a fact finder could meaningfully say precisely *x* amount of [the victim]'s psychological injuries were caused by [the defendant]'s watching the same video.

Burgess, 2012 WL 2821069, at *13 (Gregory, J., concurring in part, dissenting in part, and concurring in judgment).

fact that it conforms well to this context supports its application.

Any fears that Amy and victims like her might be overcompensated through the use of joint and several liability, as expressed under § 3664(h), are unwarranted. *See, e.g., Burgess*, 2012 WL 2821069, at * 11 ("While full compensation would be unlikely from any individual defendant, [the victim's] proposed interpretation of the restitution statute places no cap on her ultimate recovery, and would allow her to recover the amount of her losses many times over."). The use of joint and several liability does not mean that Amy may "recover more than her total loss: [rather,] once she collects the full amount of her losses from one defendant, she can no longer recover from any other." *Id.* at *14 (Gregory, J., concurring in part, dissenting in part, & concurring in judgment) (quoting TORT LAW, *supra*, at 517).

Section 3664 provides "reasonable means" to defend against any theoretical overcompensation that could result. *See* 18 U.S.C. § 3664(m)(1)(A)(ii). First, if Amy recovers the full amount of her losses from defendants, the Government and defendant may use this information to ensure that Amy does not seek further awards of restitution. *See id.* § 3664(e) (explaining that the court may resolve "[a]ny dispute as to the proper amount or type of restitution . . . by the preponderance of the evidence."). Second, § 3664(k) suggests a means for ending defendants' existing joint and several restitution obligations once Amy receives the full amount of her losses; it allows for a district

court, "on its own motion, or the motion of any party, including the victim, [to] adjust the payment schedule, or require immediate payment in full, as the interests of justice require." This broadly phrased subsection seems to enable courts to apply joint and several liability across jurisdictions because it permits those courts to adjust restitution orders as victims receive the full amount of their losses.[18] More concretely, if Amy one day receives the full amount of restitution representing the "full amount of [her] losses" under § 2259, district courts across the nation may amend the judgments of defendants to reflect this fact under § 3664(k) by terminating further restitution obligations.[19]

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[18] Use of this mechanism does not violate § 3664(f)(1)(B)'s command that courts may not consider a victim's receipt of compensation from other sources "in determining the amount of restitution" because § 2259 limits a victim's recovery to the full amount of his or her losses. Section 2259(b)(4)(B)'s similar instruction that a court may not decline to issue a restitution order "because of . . . the fact that a victim has, or is entitled to, receive compensation for his or her injuries from . . . any other source" reinforces this conclusion. Section 2259(b)(4)(B), read together with § 3664(b)(f)(1)(B), reinforces the mandatory nature of § 2259 by disallowing district courts from declining to issue restitution to crime victims while simultaneously honoring the cap § 2259 places on victims' recovery: the full amount of a victim's losses.

[19] Of course, even while Amy may not collect more than to which she is entitled, she may certainly obtain judgments in excess of that amount. Indeed, Amy has already obtained judgments exceeding $3.4 million.

In either circumstance, district courts must be in possession of evidence to support entry of restitution or amendment of the defendants' judgments. There are several potential sources of this information. Victims, of course, are in the best position to know what restitution they have recovered and what restitution they have yet to receive. In addition to information obtained from victims, the Government may rely on information maintained by the probation office and other arms of the U.S. Department of Justice to ensure that amounts reported by a victim are accurate.[20] Defendants may dispute any amounts in these requests, and, under § 3664(e), the court may resolve "[a]ny dispute as to the proper amount or type of restitution . . . by the preponderance of the evidence."[21]

c

Next, the Government asserts that not restricting the recovery of losses by proximate cause produces an absurd result – constitutional implications that could be avoided if we were to read § 2259 as

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[20] The comprehensive information the Government has provided in this case regarding the restitution ordered in other cases involving Amy confirms the Government's access to this type of information.

[21] Nothing in § 2259, § 3664, or in this opinion is intended to restrict the district court's ability to use any other mechanisms available under § 3664 to order restitution in a manner that effects § 2259's purposes.

requiring proximate causation with respect to all categories of losses. *See Lamie,* 540 U.S. at 534 (instructing that courts must enforce a statute's terms so long as "the disposition required by the text is not absurd."). Specifically, the Government is concerned that without a proximate cause limitation, § 2259 could be challenged on the ground that it subjects a defendant to excessive punishment under the Eighth Amendment.

The Eighth Amendment prescribes that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The Government posits that by giving effect to the statute's plain text, this court could cause Eighth Amendment problems similar to that expressed by a recent Supreme Court case involving criminal forfeiture: Where criminal forfeiture "would be grossly disproportional to the gravity of [an] offense," the Supreme Court held that it would violate the Excessive Fines Clause of the Eighth Amendment. *United States v. Bajakajian,* 524 U.S. 321, 324 (1998).

First, we are not persuaded that restitution is a punishment subject to the same Eighth Amendment limits as criminal forfeiture. Its purpose is remedial, not punitive. *See United States v. Webber,* 536 F.3d 584, 602-03 (7th Cir. 2008) ("Forfeiture and restitution are distinct remedies. Restitution is remedial in nature, and its goal is to restore the victim's loss. Forfeiture, in contrast, is punitive; it seeks to disgorge any profits that the offender realized from his

illegal activity.") (citations omitted); *see also United States v. Taylor*, 582 F.3d 558, 566 (5th Cir. 2009) ("Restitution operates to make the victim of the crime whole."). Even so, restricting the "proximate result" language to the catchall category in which it appears does not open the door to grossly disproportionate restitution in a way that would violate the Eighth Amendment. Section 2259 contains discrete causal limitations that precede the restitutionary right; restitution thus is limited to losses arising out of a victim's injury. *See* 18 U.S.C. § 2259(c) (imposing general causation requirement on definition of victim). Furthermore, the mechanisms under § 3664, which have already been described, further allay any concerns as to over-punishment. Fears over excessive punishment are misplaced.

Any concern that individual defendants may bear a greater restitutionary burden than others convicted of possessing the same victim's images, moreover, does not implicate the Eighth Amendment or threaten to create an absurd result. *See Arledge*, 553 F.3d at 899. Restitution is not tied to the defendant's gain; rather "so long as the government proved that the victim suffered the actual loss that the defendant has been ordered to pay, the restitution is proportional." *Id.* Even where a district court selectively imposed restitution on one co-defendant and not another, this court has treated this seeming inequality as being "of no consequence." *See id.* (citing *United States v. Ingles*, 445 F.3d 830, 839 (5th Cir. 2006) (explaining that "a district court may consider the relative

degrees of responsibility of co-defendants in imposing restitution obligations and therefore, the simple fact that like punishment was not imposed on [the co-defendants] does not offend the constitution") (internal quotation marks and citations omitted)). Thus, the fact that some defendants will be held jointly and severally liable for the full amount of Amy's losses, while other defendants convicted of possessing Amy's images may not be (because, for example, the Government or Amy does not seek restitution from them) does not offend the Eighth Amendment. *See id.*

The court, moreover, can ameliorate the impact of joint and several liability on an individual defendant by establishing a payment schedule that corresponds to the defendant's ability to pay. *See, e.g., United States v. Wright,* No. 09-CR-103, at 5 (E.D. La. Dec. 16, 2009) (explaining the payment of restitution "shall begin while the defendant is incarcerated [and u]pon release, any unpaid balance shall be paid at a rate of $200.00 per month" and further explaining that "[t]he payment is subject to increase or decrease, depending on the defendant's ability to pay."); *see also* 18 U.S.C. § 3664(e) ("The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant's dependents, shall be on the defendant.").

Ultimately, while the imposition of full restitution may appear harsh, it is not grossly disproportionate to the crime of receiving and possessing child pornography. *Cf. id.* at 899-900 (rejecting Eighth Amendment challenge to the imposition of full

restitution, pursuant to joint and several liability, under Mandatory Victims Restitution Act, in context of mail fraud case). In light of restitution's remedial nature, § 2259's built-in causal requirements, and the mechanisms described under § 3664, we do not see any Eighth Amendment concerns here or any other absurd results that our plain reading produces.

2

Accordingly, we hold that § 2259 requires a district court to engage in a two-step inquiry to award restitution where it determines that § 2259 applies. First, the district court must determine whether a person seeking restitution is a crime victim under § 2259 – that is, "the individual harmed as a result of a commission of a crime under this chapter." 18 U.S.C. § 2259(c). The Supreme Court has acknowledged that "[t]he distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children," *New York v. Ferber*, 458 U.S. 747, 759 (1982), and this court has elaborated that "children depicted in child pornography may be considered to be the victims of the crime of receiving child pornography." *United States v. Norris*, 159 F.3d 926, 929 (5th Cir. 1998). This logic applies with equal force to defendants who possess child pornography: By possessing, receiving, and distributing child pornography, defendants collectively create the demand that fuels the creation of the abusive images. Thus, where a defendant is convicted of possessing, receiving, or distributing

child pornography, a person is a victim under this definition if the images the defendant possesses, receives, or distributes include those of that individual.

Second, the district court must ascertain the full amount of the victim's losses as defined under § 2259(b)(3)(A)-(F), limiting only § 2259(b)(3)(F) by the proximate result language contained in that subsection, and craft an order guided by the mechanisms described in § 3664, with a particular focus on its mechanism for joint and several liability.

IV

Having resolved this important issue of statutory interpretation, we apply our holding to Amy's mandamus and Wright's appeal.

A

Under our traditional mandamus inquiry, we will grant Amy's petition for mandamus if (1) she has no other adequate means to attain the desired relief; (2) she has demonstrated a clear and indisputable right to the issuance of a writ; and (3) in the exercise of our discretion, we are satisfied that the writ is appropriate in these circumstances. *See Dean*, 527 F.3d at 394. As the Supreme Court has noted, the "hurdles" limiting use of mandamus, "however demanding, are not insuperable." *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 381 (2004).

We easily conclude that the first prong is met. Because we have held that the CVRA limits crime victims' relief to the mandamus remedy, Amy has no other means for obtaining review of the district court's decision not to order restitution. *See supra* § II-A. We are also satisfied that a writ is appropriate in these circumstances: The CVRA expressly authorizes mandamus, 18 U.S.C. § 3771(d)(3), and awarding restitution would satisfy § 2259's broad restitutionary purpose. Next, we conclude that Amy has a "clear and indisputable" right to restitution in light of our holding today. First, Amy is a "victim" under § 2259(c). Paroline possessed at least two of her images, and his possession of those images partly formed the basis of his conviction. *See Ferber*, 458 U.S. at 759; *Norris*, 159 F.3d at 929. Amy, as an "individual harmed as a result of [Paroline's] commission of a crime" falling within § 2259's scope, is thus a victim under § 2259. *See Kearney*, 672 F.3d at 94 ("Any argument that [Amy] has not suffered harm as a result of [Paroline's] crimes defies both fact and law."). Because Amy is a victim, § 2259 required the district court to award her restitution for the "full amount of [her] losses" as defined under § 2259(b)(3). Because the district court awarded Amy nothing, it therefore clearly and indisputably erred. No matter what discretion the district court possessed and no matter how confounding the district court found § 2259, it was not free to leave Amy with nothing.

On remand, the district court must enter a restitution order reflecting the "full amount of [Amy's] losses" in light of our holdings today.

B

Turning to Wright's appeal, Amy is eligible for restitution as a "victim" of Wright's crime of possessing images of her abuse for the same reasons she is eligible as a victim of Paroline's crime. *See supra* § IV-A. It was therefore legal for the district court to order restitution to Amy. *See Arledge*, 553 F.3d at 897 (reviewing the legality of the restitution order de novo). As such, Wright's appeal necessarily focuses on the amount of the district court's restitution award, which we review for an abuse of discretion. *Id.* The district court awarded Amy $529,661 by adding Amy's estimated future counseling costs to the value of her expert witness fees. The district court did not explain why Wright should not be required to pay for any of the other losses Amy requested, and the record does not otherwise disclose why the district court reduced the Government's full request on Amy's behalf. While the district court erred in failing to award Amy the full amount of her losses, because the Government did not appeal Wright's sentence and Amy did not seek mandamus review, under *Greenlaw v. United States*, we must affirm Wright's sentence. 554 U.S. 237, 246 (2008) (holding appellate court may not increase sentence of defendant where Government did not appeal sentence directly or on cross-appeal).

V

For the reasons above, we reject the approach of our sister circuits and hold that § 2259 imposes no generalized proximate cause requirement before a child pornography victim may recover restitution from a defendant possessing images of her abuse. We AFFIRM the district court in *United States v. Wright*, No. 09-CR-103 (E.D. La. Dec. 16, 2009). We VACATE the district court's judgment in *United States v. Paroline*, 672 F. Supp. 2d 781 (E.D. Tex. 2009), and REMAND for proceedings consistent with this opinion.[22]

DENNIS, Circuit Judge, concurring in part in the judgment.

I respectfully concur in the majority opinion's decision that the CVRA does not grant crime victims a right to a direct appeal from a district court's rejection of her claim for restitution under 18 U.S.C. § 2259; that the CVRA grants crime victims only a right to seek traditional mandamus review; and that the CVRA grants the government the right to seek mandamus and to retain its right to a direct appeal.

I further agree with the majority that neither the Government nor the victim is required to prove that the victim's losses defined by 18 U.S.C.

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[22] Amy's motion to strike portions of the Government's brief is DENIED.

§ 2259(b)(3)(A)-(E) were a proximate result of the defendant's crime; it is only "any other loss suffered by the victim" that must be proved to be "a proximate result of the offense." *Id.* § 2259(b)(3)(F). Section 2259(c) defines "victim" as an "individual harmed as a result of a commission of a crime under this chapter," but it does not require a showing that the victim's losses included in § 2259(b)(3)(A)-(E) be a "proximate result of the offense." From this, I infer that the statute places only a slight burden on the victim or the government to show that the victim's losses or harms enumerated in those subsections plausibly resulted from the offense. Once that showing has been made, in my view, a presumption arises that those enumerated losses were the proximate result of the offense, which the defendant may rebut with sufficient relevant and admissible evidence.

Finally, I agree with the majority's conclusion that where a defendant is convicted of possessing child pornography, a person is a victim under the statute if the images include those of that individual. In these cases, I agree that the government and the victim have made a sufficient showing, unrebutted by the defendant, that the victim is entitled to restitution of losses falling under 18 U.S.C. § 2259(b)(3)(A)-(E). Therefore, I concur in that part of the majority's judgment that vacates the district courts' judgments and remands the cases to them for further proceedings.

In remanding, however, I would simply direct the district courts to proceed to issue and enforce the

restitution orders in accordance with 18 U.S.C. § 3664 and 3663A, as required by § 2259(b)(2). Going forward, I believe it best to permit district courts to craft procedural and substantive devices for ordering restitution that would take into account both the mandatory nature of full restitution for crime victims under section 2259 and the mechanical difficulties of crafting orders given the possibility of multiplicitous liability among hundreds of defendants under circumstances that may change over time. While I admire the majority's effort to provide guidance to the district courts in their extremely difficult task of molding and merging these federal statutes, §§ 2259, 3663A, and 3664, into a legal, just, and predictable system, I believe that effort is premature in this court at this time on the present record. Rather, I would leave the decision as to how to proceed under these statutes to the district courts, which may decide to take additional evidence and require study and briefing by the parties to assist them in these difficult cases.

W. EUGENE DAVIS, Circuit Judge, concurring in part and dissenting in part, joined by KING, SMITH, and GRAVES, Circuit Judges.

I agree with my colleagues in the majority that we should grant mandamus in *In re Amy* and remand

for entry of a restitution award.[1] I also agree that we should vacate the award entered in *Wright* and remand for further consideration on the amount of the award. The devil is in the details, however, and I disagree with most of the majority's analysis.

I disagree with my colleagues in the majority in two major respects:

1. Although I conclude that the proximate cause proof required by the restitution statutes can be satisfied in these cases, I disagree with the majority that the statute authorizes restitution without any proof that the violation proximately caused the victim's losses.

2. I agree with the majority that the district court must enter a restitution award against every offender convicted of possession of the victim's pornographic image; but I disagree with the majority that in cases such as these two, where the offenses of multiple violators contribute to the victim's damages, the district court must enter an award against each offender for the full amount of the victim's losses. No other circuit that has addressed this issue has adopted such a one size fits all rule for the restitution feature of the sentence of an offender. Other circuits have given the district courts discretion to assess the

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[1] Section 2259 directs courts to "order restitution for any offense under this chapter." District courts do not have discretion to make no award.

amount of the restitution the offender is ordered to pay. *See, e.g., United States v. Burgess*, 684 F.3d 445, 460 (4th Cir. 2012); *United States v. Kearney*, 672 F.3d 81, 100-01 (1st Cir. 2012); *United States v. McGarity*, 669 F.3d 1218, 1270 (11th Cir. 2012); *United States v. Laney*, 189 F.3d 954, 967 (9th Cir. 1999).

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I.

THE STATUTES

At bottom, this is a statutory interpretation case, and I begin with a consideration of the structure and language of the statutes at issue that facially belie the majority's position that victims may be awarded restitution for losses not proximately caused by offense conduct. Section 2259 specifically governs mandatory restitution awards for crimes related to the sexual exploitation and abuse of children. A number of provisions in the statute make it clear that proof of a causal connection is required between the offenses and the victim's losses.

Section 2259(b)(2) expressly incorporates the general restitution procedures of 18 U.S.C. § 3664 and states that "[a]n order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A." Section 3664(e) states that "[t]he burden of demonstrating the *amount of the loss* sustained by a victim *as a result of the offense* shall be

on the attorney for the Government." (emphasis added).

This language requiring proof of causation from § 3664(e) is consistent with the language defining "victim" found in § 2259(c), who is defined as "the individual harmed *as a result of* a commission of crime under this chapter. . . ." (emphasis added).

Section 2259(a) states that the court "shall order restitution for any offense under this chapter." Section 2259(b)(3) states that the victim's losses are defined as those suffered by the victim "as a proximate result of the offense." The full text of § 2259(b)(3) is as follows:

> [T]he term "full amount of the victim's losses" includes any costs incurred by the victim for –
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> > (A) medical services relating to physical, psychiatric, or psychological care;
> >
> > (B) physical and occupational therapy or rehabilitation;
> >
> > (C) necessary transportation, temporary housing, and child care expenses;
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> > (D) lost income;
> >
> > (E) attorneys' fees, as well as other costs incurred; and
> >
> > (F) any other losses suffered by the victim *as a proximate result of the offense.*

(emphasis added).

In interpreting this provision we should follow the fundamental canon of statutory construction established by the Supreme Court in *Porto Rico Railway, Light & Power Co. v. Mor*, 253 U.S. 345 (1920). In that case, the Court held that "[w]hen several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." *Id.* at 348. Applying this cardinal rule of statutory interpretation, I conclude that subsection (F)'s "as a proximate result of the offense" language applies equally to the previous five subcategories of losses, (A) through (E). This interpretation was accepted by the Eleventh Circuit in *United States v. McDaniel*, 631 F.3d 1204, 1209 (11th Cir. 2011) ("The phrase 'as a proximate result of the offense' is equally applicable to medical costs, lost income, and attorneys' fees as it is to 'any other losses.'" (citing *Porto Rico Ry.*, 253 U.S. at 348)); *see also Laney*, 189 F.3d at 965 (reading the "as a result of" language in § 2259's definition of victim together with the "proximate result" language in § 2259(b)(3)(F) to infuse all of 2259(b)(3) with a proximate cause requirement).

In contrast, the majority concludes that once the district court determines that a person is a victim (an individual harmed as a result of an offense under

§ 2259) the district court must order restitution without further proof of causation.[2]

The majority's reading of § 2259(b)(3) is patently inconsistent with the rule of statutory interpretation announced in *Porto Rico Railway,* which makes it clear that the clause should be read to apply to all categories of loss.[3] My conclusion that *Porto Rico Railway*'s rule of interpretation applies in this case is made even clearer when we consider the multiple references in the statutes discussed above expressly reflecting Congressional intent to require proof of causation.

The D.C. Circuit and other circuits have reached the same conclusion – that is, that § 2259 requires proof of proximate cause – albeit by a slightly different reasoning. *See United States v. Monzel,* 641 F.3d 528, 535-37 (D.C. Cir. 2011); *United States v. Aumais,* 656 F.3d 147, 153 (2d Cir. 2011); *Burgess,* 684 F.3d at 459. The D.C. Circuit explained that it is

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[2] The majority would apparently hold that if Amy were injured in an automobile accident on the way to a counseling session, those damages would be included in a restitution award.

[3] I am not persuaded by *In re Amy*'s attempt to distinguish the statute in *Porto Rico Railway* on the basis that the subcategories of § 2259(b)(3) are separated by semicolons rather than commas. *See In re Amy,* 636 F.3d 190, 199 (5th Cir. 2011). Either punctuation device is an acceptable method of separating clauses. *See* BRYAN A. GARNER, THE REDBOOK: A MANUAL ON LEGAL STYLE 1-15 (2d. ed. 2006).

> a bedrock rule of both tort and criminal law that a defendant is only liable for harms he proximately caused. ("An essential element of the plaintiff's cause of action for negligence, or . . . any other tort, is that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered. This connection usually is dealt with by the courts in terms of what is called 'proximate cause'. . . .").

(footnote omitted) (citation omitted) (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 263 (5th ed. 1984)); *see also* WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 6.4, at 464 (2d ed. 2003) ("[For] crimes so defined as to require not merely conduct but also a specified result of conduct, the defendant's conduct must be the 'legal' or 'proximate' cause of the result."). "Thus, we will presume that a restitution statute incorporates the traditional requirement of proximate cause unless there is good reason to think Congress intended the requirement not to apply." *Monzel,* 641 F.3d at 536. The court found that "nothing in the text or structure of § 2259 leads us to conclude that Congress intended to negate the ordinary requirement of proximate cause." *Id.*

Other circuits have used different analyses but all circuits to confront this issue have interpreted the statute as using a proximate causation standard connecting the offense to the losses. *See United States v. Evers,* 669 F.3d 645, 658-59 (6th Cir. 2012) (finding a proximate cause requirement but declining to

choose whether to adopt the *McDaniel* or *Monzel* rationale as they are "complementary"); *Kearney*, 672 F.3d at 96, 99 (adopting a proximate cause standard but not specifying under what analysis); *United States v. Crandon*, 173 F.3d 122, 125-26 (3d Cir. 1999) (stating, without analysis, that § 2259 requires damages for losses suffered "as a proximate result of the offense"). This circuit is the only circuit that has interpreted § 2259 and concluded that proximate cause is not required by the statute.

For the above reasons, I conclude that the statutes at issue require proof that the defendant's offense conduct proximately caused the victim's losses before a restitution award can be entered as part of the defendant's sentence.

II.

CAUSATION

In cases such as the two cases before this court where the conduct of multiple offenders collectively causes the victim's damages, I would follow the position advocated by the Government and adopted by the First Circuit and the Fourth Circuit to establish the proximate cause element required by § 2259. *Kearney*, 672 F.3d at 98-99; *Burgess*, 684 F.3d at 459-60. Under this "collective causation" theory, it is not necessary to measure the precise damages each of the over 100 offenders caused. As the First Circuit in *Kearney* stated: "Proximate cause exists where the tortious conduct of multiple actors has combined to

bring about harm, even if the harm suffered by the plaintiff might be the same if one of the numerous tortfeasors had not committed the tort." 672 F.3d at 98. The court relied on the following statement of the rule from Prosser and Keeton:

> When the conduct of two or more actors is so related to an event that their combined conduct, viewed as a whole, is a but-for cause of the event, and application of the but-for rule to each of them individually would absolve all of them, the conduct of each is a cause in fact of the event.

KEETON ET AL., *supra*, § 41, at 268.

The court explained further:

> Proximate cause therefore exists on the aggregate level, and there is no reason to find it lacking on the individual level. The Restatement (Third) of Torts has recognized this: causation exits even where "none of the alternative causes is sufficient by itself, but together they are sufficient" to cause the harm.

Kearney, 672 F.3d at 98 (quoting RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 27 reporters' n. cmt. g. (2010); *id.* § 36 cmt. a ("[E]ven an insufficient condition . . . can be a factual cause of harm when it combines with other acts to constitute a sufficient set to cause the harm.")).

I agree with the Government and the First and Fourth Circuits that this definition of proximate

cause is appropriate in this context and under this standard the causation requirement in both cases before us is satisfied.

III.

AMOUNT OF THE AWARD

The most difficult issue in these cases – where multiple violators combine to cause horrendous damage to a young victim – is establishing some standards to guide the district court in setting an appropriate restitution award for the single offender before the court.

I agree that Amy is a victim in both cases before us. Defendant Paroline (in *In re Amy*) and defendant Wright possessed Amy's pornographic images and the statute requires the court to enter an award against them.

I agree that Amy is entitled to a restitution award from all of her offenders in a sum that is equal to the amount of her total losses. But in cases such as these where multiple violators have contributed to the victim's losses and only one of those violators is before the court, I disagree that the court must always enter an award against that single violator for the full amount of the victim's losses. I agree that § 3664(h) gives the court the option in the appropriate case of entering an award against a single defendant for the full amount of the victim's losses even though other offenders contributed to these losses. I also

agree that in that circumstance the defendant can seek contribution from other offenders jointly liable for the losses.[4] We have allowed such contribution claims in analogous non-sex offender cases. *E.g.*, *United States v. Arledge*, 553 F.3d 881, 899 (5th Cir. 2008) (finding that defendant could "seek contribution from his co-conspirators to pay off the restitution award and reduce the amount he personally owe[d]" in the context of a fraud scheme with multiple participants); *accord United States v. Martinez*, 610 F.3d 1216, 1234 (10th Cir. 2010); *United States v. Newsome*, 322 F.3d 328, 340-41 (4th Cir. 2003).

In concluding that an award for the full amount of the victim's losses is required the majority relies on § 3664(h) which provides:

> If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or *may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant.*

(emphasis added). The majority simply ignores the second clause in § 3664(h) emphasized above. That

---

[4] The Government argued that contribution would not apply in this context because the statute did not authorize it and, in any event, it would not apply among defendants convicted in different courts; but their authority on this point is very thin and does not directly and strongly support this view.

subsection plainly gives the court the option of either (1) assessing a restitution award against the single defendant in an amount that is equal to the victim's total losses or (2) apportioning liability among the defendants to reflect each defendant's level of contribution to the victim's loss taking into consideration a number of factors including the economic circumstances of each defendant. *Accord McGarity*, 669 F.3d at 1270. It would be surprising if Congress had not given courts this option. After all, restitution is part of the defendant's criminal sentence and § 3664(h), consistent with sentencing principles generally, gives the sentencing judge discretion to fix the sentence based on the facts and circumstances surrounding the defendant's circumstances, background, and nature of his conduct. *See, e.g.*, *Burgess*, 684 F.3d at 460; *Kearney*, 672 F.3d at 100-01; *McGarity*, 669 F.3d at 1270; *Laney*, 189 F.3d at 967. One size does not fit all in this context any more than the length of a prison sentence or any other feature of a criminal sentence.

I agree with the majority that the defendants in both cases before us having been convicted of violating 18 U.S.C. § 2252 must be ordered to pay restitution to Amy. We should leave the calculation of the appropriate award against each defendant to the district court in the first instance. I would give the district court the following general guidelines:

The court must recognize that Amy's losses are an aggregation of the acts of the person who abused and filmed her assault, those who distributed and redistributed her images, and those who possessed

those images. The culpability and liability for restitution of any one defendant regarding Amy's loss is dependent at least in part on the role that defendant played with respect to her exploitation. *See, e.g., Burgess*, 684 F.3d at 460.

The court should first compute the victim's probable future losses based on evidence of the damages she will likely incur from the date of the defendant's offense conduct into the foreseeable future. The court should consider all items of damage listed in § 2259(b)(3) as well as any other losses suffered by the defendant related to the conduct of the violators of this chapter.

In a case such as this where multiple individuals have been convicted of contributing to her abuse, the district court has the discretion under § 3664(h) either to enter an award for the total amount of her provable losses or some portion of those losses to reflect the defendant's role in causing the damage as well as the other surrounding circumstances.

The district court is not required to justify any award with absolute precision, but the amount of the award must have a factual predicate. In determining whether it should cast the single defendant before it for the total amount of the victim's losses or in fixing the amount of a smaller award the court should consider all relevant facts including without limitation the following:

1. The egregiousness of the defendant's conduct including whether he was involved in the physical

abuse of this victim or other victims, and whether he attempted to make personal contact with victims whose images he viewed or possessed.

2. For defendants who possessed images of the victim, consider the number of images he possessed and viewed, and whether the defendant circulated or re-circulated those images to others.

3. The financial means of the defendant and his ability to satisfy an award.

4. The court may consider using the $150,000 liquidated civil damage award authorized by 18 U.S.C. § 2255 or a percentage thereof as a guide in fixing the amount of the award.

5. The court may also consider as a guide awards made in similar cases in this circuit and other circuits.

6. Any other facts relevant to the defendant's level of contribution to the victim's loss and economic circumstances of the defendant.

IV.

CONCLUSION

In summary, I would grant mandamus and vacate the judgment in *In re Amy* and remand that case to the district court to enter an award consistent with the principles outlined above. I would also vacate the judgment in *Wright* and remand for entry of judgment consistent with the above guidelines.

LESLIE H. SOUTHWICK, Circuit Judge, dissenting:

We are confronted with a statute that does not provide clear answers. I join others in suggesting it would be useful for Congress "to reconsider whether § 2259 is the best system for compensating the victims of child pornography offenses." *United States v. Kennedy*, 643 F.3d 1251, 1266 (9th Cir. 2011); *see also United States v. Burgess*, 684 F.3d 445, 460 (4th Cir. 2012). The goal is clear: providing meaningful restitution to victims of these crimes. How to order restitution in individual cases in light of that goal is a difficult question.

Our task today is to effectuate the scheme according to the congressional design as best as we can discern it. Both of the other opinions have ably undertaken this difficult task. I agree with Judge Davis that this circuit should not chart a solitary course that rejects a causation requirement. The reasons why I believe the statute requires causation are different than he expresses, though. I agree with the majority, relying on the last-antecedent rule, that the phrase "as a proximate result of the offense" that is in Section 2259(b)(3)(F) only modifies the category of loss described in (F). *See, e.g., Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 343 (2005).

Though I agree with the majority in that respect, I find persuasive the reasoning of the Second, Fourth, and D.C. Circuits that causation "is a deeply rooted principle in both tort and criminal law that Congress did not abrogate when it drafted § 2259." *United*

States v. Aumais, 656 F.3d 147, 153 (2d Cir. 2011); *Burgess*, 684 F.3d at 457; *United States v. Monzel*, 641 F.3d 528, 535-36 (D.C. Cir. 2011). In a similar vein, the Supreme Court stated that absent "some indication of congressional intent, express or implied," courts will decline to read federal statutory crimes that fail to mention it, as eliminating the *mens rea* requirement that has been a hallmark of crimes since the common law. *Staples v. United States*, 511 U.S. 600, 605-06 (1994).

True, the positioning of the phrase "proximate result" solely within subsection (F) could be a sign that Congress meant to eliminate causation for damages falling under subsections (A)-(E). Any such implication is thoroughly defeated, though, by other provisions of the statute. First, as the D.C. Circuit has recognized, Section 2259 calls for restitution to go to a "victim" of these crimes, a term defined as "the individual harmed *as a result* of a commission of a crime under this chapter." *Monzel*, 641 F.3d at 535 (emphasis added). Second, the statute directs that an order of restitution should be issued and enforced "in the same manner as an order under section 3663A." § 2259(b)(2). Under Section 3663A "'victim' means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered." § 3663A(2). The "as a result" language from Section 2259 as well as the more explicit mention of proximate harm in Section 3663A convince me that "nothing in the text or structure of the restitution statute affirmatively indicates that Congress

intended to negate the ordinary requirement of proximate causation for an award of compensatory damages." *Burgess*, 684 F.3d at 457; *Monzel*, 641 F.3d at 536.

I understand the contours of this proximate-cause requirement in much the same manner as does Judge Davis, including his analysis of "collective causation." *See also United States v. Kearney*, 672 F.3d 81, 96-98 (1st Cir. 2012). I also agree that the option of "apportion[ing] liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant" belies the majority's notion that each case calls for an award equal to the total loss incurred by a victim. § 3664(h). Yet by making restitution "mandatory" for all these crimes of exploitation, including possession and distribution of child pornography, Congress made its "goal of ensuring that victims receive full compensation" plain. *Kearney*, 672 F.3d at 99.

Awards must therefore reflect the need to make whole the victims of these offenses. As Amy's suffering illustrates, the "distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children." *New York v. Ferber*, 458 U.S. 747, 759 (1982). They constitute an indelible "record of the children's participation and the harm to the child is exacerbated by their circulation." *Id.*

In light of the unique nature of prosecutions for child pornography and the clear congressional intent to maximize awards, any doubts about the proper amount of restitution should be resolved in favor of the child. This concern is largely a matter of a difference of emphasis from the views expressed by Judge Davis. I am concerned that his emphasis on the discretion of a district court, though clearly that discretion exists and can be exercised under the terms of Section 3664, tends towards accepting inappropriately low, even nominal awards. I would not accept that a forward-looking estimate of the number of future defendants and awards should be used to estimate a percentage of overall liability to be assigned a particular defendant. That puts too much weight on the interests of the defendants. Overcompensation is an unlikely eventuality. Were it to occur, then at that point district courts might be able to shift to evening up contributions among past and future defendants.

In summary, proximate cause must be shown and the principle of aggregate causation is the method for proving its existence. By statute, district courts can award all damages to each defendant but also have discretion to make lesser awards if properly explained. This means that I agree with requiring additional proceedings as to both defendants, but disagree that each district court is *required* to impose a restitution award of the full amount of damages.

PETITIONER'S BRIEF

RECORD
AND
BRIEFS

No. 12-8561

In The
Supreme Court of the United States

DOYLE RANDALL PAROLINE,

Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTION PRESENTED

What, if any, causal relationship or nexus between the defendant's conduct and the victim's harm or damages must the government or the victim establish in order to recover restitution under 18 U.S.C. §2259?

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OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit issued four opinions, two *en banc* and two panel. They are (in reverse chronological order):

1. *In re Amy Unknown,* 701 F.3d 749 (5th Cir.2012) (*en banc*) (opinion on rehearing). J.A. 425.

2. *In re Amy Unknown,* 697 F.3d 596 (5th Cir.2012) (*en banc*), the initial opinion on rehearing *en banc.* J.A. 349.

3. *In re Amy Unknown,* 636 F.3d 190 (5th Cir.2011) (opinion on panel rehearing). J.A. 325.

4. *In re Amy Unknown,* 591 F.3d 792 (5th Cir.2009) (initial panel opinion). J.A. 298.

The District Court issued a memorandum and opinion. *United States v. Paroline,* 672 F.Supp.2d 781 (E.D. Tex. 2009). J.A. 271.

JURISDICTION

The District Court had jurisdiction over this federal criminal case pursuant to 18 U.S.C. §3231. The Court of Appeals had jurisdiction over the appeal pursuant to 28 U.S.C. §1291 and 18 U.S.C. §3771(d)(3). The Court of Appeals issued an opinion on rehearing from its earlier *en banc* opinion on November 19, 2012. On January 31, 2013, Mr. Paroline filed his petition for a writ of certiorari,

which this Court granted on June 27, 2013. This Court has jurisdiction pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 18 U.S.C. §2259 captioned "Mandatory Restitution" reads in full:

> (a) In general. – Notwithstanding section 3663 or 3663A, and in addition to any other civil or criminal penalty authorized by law, the court shall order restitution for any offense under this chapter.
>
> (b) Scope and nature of order. –
>
> (1) Directions. – The order of restitution under this section shall direct the defendant to pay the victim (through the appropriate court mechanism) the full amount of the victim's losses as determined by the court pursuant to paragraph (2).
>
> (2) Enforcement. – An order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A.
>
> (3) Definition. – For purposes of this subsection, the term "full amount of the victim's losses" includes any costs incurred by the victim for –

(A) medical services relating to physical, psychiatric, or psychological care;

(B) physical and occupational therapy or rehabilitation;

(C) necessary transportation, temporary housing, and child care expenses;

(D) lost income;

(E) attorneys' fees, as well as other costs incurred; and

(F) any other losses suffered by the victim as a proximate result of the offense.

(4) Order mandatory. –

(A) The issuance of a restitution order under this section is mandatory.

(B) A court may not decline to issue an order under this section because of –

(i) the economic circumstances of the defendant; or

(ii) the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source.

> (c) Definition. – For purposes of this section, the term "victim" means the individual harmed as a result of a commission of a crime under this chapter, including, in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, but in no event shall the defendant be named as such representative or guardian.

All other Constitutional and statutory provisions are included in the Appendix as follows:

1.	Appendix A.	U.S. CONST. amend. VIII.
2.	Appendix B.	18 U.S.C. §1593.
3.	Appendix C.	18 U.S.C. §2248.
4.	Appendix D.	18 U.S.C. §2264.
5.	Appendix E.	18 U.S.C. §2327.
6.	Appendix F.	18 U.S.C. §3553.
7.	Appendix G.	18 U.S.C. §3663.
8.	Appendix H.	18 U.S.C. §3663A.
9.	Appendix I.	18 U.S.C. §3664.

STATEMENT OF THE CASE

In 1997, Eugene Zebroski started sexually abusing Amy[1] his 8 year old niece. Zebroski photographed the horrific acts he perpetrated against Amy, including vaginal rape, digital penetration, attempted sodomy, cunnilingus and fellatio. Zebroski's abuse was ultimately discovered by law enforcement after he started sharing these over the internet. He was prosecuted in late 1998, was sentenced to prison for his crimes and ordered to pay just over $6,300.00 in restitution to Amy as part of his federal sentence in the United States District Court for the Eastern District of Pennsylvania. J.A. 170. Paroline did not participate in, and indeed, had no knowledge of Zebroski's criminal activity.

On January 9, 2009, Paroline was arrested and entered a guilty plea in the Eastern District of Texas to one count of possessing material involving the sexual exploitation of minors in violation of 18 U.S.C. §§2252(a)(4)(B) and 2252(b)(2). J.A. 1. Specifically, Paroline had downloaded approximately 300 images of minors engaged in sexually explicit conduct. J.A. 146. Amy was identified as the minor in two of the images possessed by Paroline. J.A. 146. The Government found no evidence that Paroline had distributed any images in his possession, including those of Amy. J.A. 146. On April 17, 2009, the Department of Justice notified Amy's attorney of Paroline's guilty plea

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[1] Amy's actual identity is unknown.

and that his sentencing hearing was set for May 27, 2009. J.A. 22.

On May 1, 2009, Amy's attorney filed a request for restitution with the United States Attorney for the Eastern District of Texas seeking $3.4 million from Paroline. J.A. 27. The request included a legal brief from Amy's attorney[2] and a victim impact statement from Amy.[3] J.A. 59. The damage model Amy's attorney submitted was supported by two expert reports that were prepared prior to Paroline's arrest and conviction: a November 21, 2008 psychological report from Dr. Joyanna Silberg, J.A. 67, and a September 8, 2008 report on projected economic losses from Dr. Stan V. Smith, Ph.D. J.A. 88.

On June 10, 2009, the District Court severed the restitution issue and, after a contested hearing, sentenced Paroline to 24 months imprisonment and ten years supervised released. J.A. 3. The District Court requested all of the parties, including Amy as a Victim/Party, as well as any other interested individuals, file briefs addressing the issue of restitution in

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[2] Amy argued that Paroline had "contributed to Amy's psychiatric 'death by a thousand cuts'" by distributing her images and trading them for other images, even though the Government stated as a matter fact that there was no evidence that Paroline distributed child pornography. J.A. 146.

[3] Although titled "Victim Impact Statement of Amy – the Victim in the Misty Series," the statement was actually written by Dr. Joyanna Silberg in September of 2008 as part of Amy's request for restitution in an unrelated case. J.A. 154.

child exploitation cases, including whether there was a proximate cause requirement between the victim's losses and the particular defendant's conduct.[4] J.A. 2-3.

The District Court held two restitution hearings and, for the first time in any case where Amy submitted a request for restitution, the defense submitted expert reports challenging Amy's damage model and her experts' conclusions supporting the model. During the first hearing, Amy's attorney stated that he withdrew requests for restitution in 80% of cases in which Amy received notice of prosecutions involving her image. J.A. 158. The District Court noted Amy's restitution request included losses associated with the costs for future psychological care, future lost income, and attorney's fees. According to Dr. Silberg's report, Amy's request for restitution stems primarily from the sexual abuse that she suffered as a child by her uncle and her perception that individuals are viewing her abuse on the internet. In her report, Dr. Silberg notes:

> Most significantly, at the age of 17, Amy was informed through legal notifications about the widespread presence of her picture on the internet illustrating to her that in some

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[4] The Administrative Office of the United States Courts answered the District Court's inquiry by filing a letter dated August 17, 2009 wherein the opinion was expressed that an award of restitution pursuant to §2259 required a showing that a defendant's conduct of conviction proximately caused a victim's losses or damages. J.A. 137-142.

> ways the sexual abuse of her has never really ended. This knowledge further exacerbated her symptoms, interfered with her ability to overcome the increasing symptoms of post traumatic stress, and impeded her ability to move on with her life.

J.A. 71.

Dr. Silberg stated that with each new discovery[5] of another defendant trading her image retraumatized Amy.[6] J.A. 73. Other than this generalized fear that people were viewing her image, Amy offered no alternate theory of restitution for the portion of her damages that she was seeking to recover from Paroline. The Government presented no evidence of any damages or losses that were actually incurred by Amy after the preparation of Dr. Silberg's report or as a direct result of Paroline's offense conduct.

To controvert Amy's request for restitution, Paroline submitted a report (J.A. 213) from Dr. Timothy J. Proctor, a Board Certified Forensic Psychologist,

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[5] Congress requires that all victims of child pornography be given the choice of being informed when the child's images are discovered in possession of a specific individual. At her request, Amy has requested that she be notified through her attorney when NCMEC identifies her image in an individual's collection. In this case, Amy has stipulated that she not been personally informed of Paroline's possession of her image and none of her damages flow from that possession.

[6] This conflicts with Amy's acknowledgment that she was never informed of Paroline's conduct or his arrest and prosecution.

who reviewed all of the data underlying Dr. Silberg's report[7] wherein he states:

> For reasons that are outlined below, it is my opinion that the amount of weight that can be placed on Dr. Silberg's opinions and conclusions in this case is very limited. Given that the loss analysis conducted by Dr. Smith was based largely on the opinions and conclusions put forth by Dr. Silberg, it is also my opinion that the extent to which his findings can be relied upon in this case appears to be very limited.

J.A. 216.

Dr. Proctor expressed five major concerns in the claim for damages by Amy:

> 1. From the information reviewed and analyzed, concern appears warranted regarding the extent to which, in this case, Dr. Silberg successfully served the role of an objective forensic psychological evaluator,

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[7] In preparation of his report, Dr. Proctor reviewed Dr. Silberg's report dated 11/21/08, her handwritten notes as well as the raw test data from the psychological tests she administered to Amy, as well as her victim impact statement. Also reviewed were other documents that were reportedly relied upon by Dr. Silberg and/or Dr. Smith. Included within these documents were criminal records regarding the prosecution of Amy's uncle for his abuse of her as well as records from the mental health evaluation and treatment services Amy received after her abuse by her uncle came to light as well as the transcript of the initial hearing in this cause. J.A. 216.

which appears to have been her expressed intention. J.A. 216.

2. Although consideration of objective sources of data is the hallmark of a forensic psychological evaluation, it appears, based in the materials reviewed, that Dr. Silberg relied very heavily on Amy's subjective self-report. J.A. 219.

3. As was already demonstrated to some extent in the previous section, it appears that Dr. Silberg inadequately considered alternative hypothesis (sic) and overly attributed problematic behavior (e.g., academic problems, vocational problems, alcohol abuse) to Amy's sexual abuse history, without fully exploring alternative hypotheses and considering that the cause of behavior is often multifaceted. J.A. 224.

4. Psychological testing is typically of great value in forensic evaluations. Unfortunately, however, in this case Dr. Silberg administered only a very small battery of tests (i.e., two) that were inadequate due to the absence of well-established validity scales and because the tests were overly specific in nature. J.A. 225.

5. Finally, it is my opinion that Dr. Silberg's conclusions regarding the impact of Amy's abuse history on her over the course of her lifetime, and regarding the amount of treatment she will require in the future, is highly speculative and seems inconsistent with the

results of her prior period of treatment.[8] J.A. 227.

In addition to the expert reports[9] submitted by Paroline and Amy, the District Court also considered the stipulation entered on October 14, 2009:

> It is stipulated by and between the Government and Doyle Randall Paroline who are the parties in this case and, also, by James R. Marsh who is, pursuant to 18 U.S.C. § 3771, Amy's representative that:
>
> Any and all notices required to be sent by to the Government to Amy were received by Mr. James R. Marsh, Amy's representative.
>
> Mr. Marsh did not pass on any of these notices to Amy or inform her that he had received them, Amy does not know who Doyle Randall Paroline is.
>
> **None of the damages for which Amy is now seeking restitution flow from anyone telling her specifically about Mr. Paroline or telling her about his**

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[8] As an example, Dr. Proctor noted the treatment notes of Ruby Salazer, LSW, BCD who treated Amy from October, 1998 through the end of 1999. Her treatment notes indicate that Amy was back to normal. The treatment of Amy was apparently successful.

[9] Paroline also submitted a report challenging Amy's projected lost earnings prepared by Dr. Kenneth Galbreath. J.A. 172.

conduct which was the basis of the prosecution in this case.

J.A. 230. (Emphasis added).

In the District Court, Amy's attorney conceded that a nexus is required between a request for damages and the offense of conviction:

> The Court: So, Mr. Marsh. Are you – do you – are you saying that other than paragraph F, the statute does have a causation requirement? And, if so, what type of requirement? Or that it does not have any causation requirement at all?
>
> Mr. Marsh: **Your Honor, it would be folly for me to argue that we did not have to show harm caused by the commission of *this crime*.** Clearly, it is not a strict liability, if you will, that, you know, if X then Y or you automatically are entitled to damages because of some, you know, statutory violation. We clearly have to establish harm. We clearly have to show harm by the commission of the crime. And I think that we have established harm by the commission of this crime.

J.A. 224. (Emphasis added).

In its opinion[10] the District Court noted that in order to substantiate her claim for restitution, Amy submitted: (1) a victim impact statement; (2) a psychological report dated November 21, 2008; (3) an economic report by Dr. Stan Smith dated September 15, 2008; and (4) numerous excerpts from articles discussing the harms associated with child pornography. The District Court found that the losses described by Amy's experts "were generalized and caused by her initial abuse as well as the general existence and dissemination of her pornographic images." The District Court found that "[n]o effort has been made to show the portion of these losses specifically caused by Paroline's possession of Amy's image." *United States v. Paroline*, 672 F.Supp.2d at 792. The District Court also noted that the report by Dr. Proctor enumerated his concerns as to the reliability of Dr. Silberg's report upon the identifiable discrepancies between Amy's victim impact statement and Dr. Silberg's report. *Id.* at 792. The District Court concluded that the Government had not met its burden of proving "what losses, if any, were proximately caused by Paroline's possession of Amy's two pornographic images." *Id.* at 793.

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[10] On the same day that the District Court issued its opinion in Paroline's case, the court applied 18 U.S.C. §2259 in *United States v. Baker*, 672 F.Supp.2d 771 (E.D.Tex. 2009) to award restitution of $462,000.00 to three victims after finding their losses were proximately caused by that defendant's offense conduct.

SUMMARY OF ARGUMENT

The plain text of 18 U.S.C. §2259, its relationship to other statutes, and longstanding principles of criminal law, all require the Government to prove a causal relationship or nexus between a defendant's offense conduct and a victim's losses in order for a district court to order restitution. All of the courts of appeals, except the Fifth Circuit, require proximate cause between a defendant's crime and the losses or damages a victim suffered.[11] Any other result would undermine the sentencing scheme envisioned by Congress as set out in 18 U.S.C. §3553(a) and would turn criminal restitution for child exploitation into strict liability proceedings where a defendant's financial punishment is limitless. Under a strict liability standard, a defendant would be liable for all losses or damages identified by a victim, irrespective of when the losses or damages occurred and irrespective of who was actually responsible for those specific losses or damages.

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[11] *United States v. Kearney*, 672 F.3d 81 (1st Cir.2012); *United States v. Aumais*, 656 F.3d 147 (2d Cir.2011); *United States v. Crandon*, 173 F.3d 122 (3d Cir.1999) (*dicta*); *United States v. Burgess*, 684 F.3d 445 (4th Cir.2012); *United States v. Evers*, 669 F.3d 645 (6th Cir.2012); *United States v. Laraneta*, 700 F.3d 983 (7th Cir.2012); *United States v. Fast*, 709 F.3d 712 (8th Cir.2013); *United States v. Kennedy*, 643 F.3d 1251 (9th Cir.2011), *In re Amy*, 698 F.3d 1151 (9th Cir.2012), *pet. for cert. filed*; *United States v. Benoit*, 713 F.3d 1 (10th Cir.2013); *United States v. McDaniel*, 631 F.3d 1024 (11th Cir.2011); *United States v. Monzel*, 641 F.3d 528 (D.C. Cir.), *cert. denied sub nom. Amy v. Monzel*, ___ U.S. ___, 132 S. Ct. 756 (2011).

The *en banc* Fifth Circuit's construction of §2259 ignored its plain language, context and its relationship with other sentencing and restitution statutes and traditional concepts of tort and criminal law. The *en banc* Fifth Circuit decision is not limited to Chapter 110 offenses but would also apply to every other offense for which restitution is mandatory. *See* 18 U.S.C. §§1593,[12] 2248 & 2264. Each of the foregoing statutes have categories of compensable losses nearly identical to those of §2259 with the identical "result of offense" language. §§2248(b)(3)(E); 2264(b)(3)(E). Neither the language of §§2248, 2264 or 2259, nor their context or legislative history supports the conclusion that Congress intended to wholly eliminate the application of proximate cause to restitution in a criminal case or that restitution is punitive.

The definition of "victim" in §2259(c) also supports the requirement of a nexus between the defendant's offense conduct, a victim's losses or damages and the amount of restitution. In that subsection, Congress defined "victim" as "the individual harmed as the result of a commission of a crime" under that chapter. The plain language of the restitution statute links the status of "victim" to losses or damages "caused as a result of" the "commission of a crime."

The *en banc* Fifth Circuit failed to read §2259 as a whole when it designed its joint and several liability

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[12] Section 1593 does not provide a category of losses but rather cross references §2259(b)(3).

rule. It created an administrative and judicial nightmare by holding every defendant liable for all of the losses or damages of a victim even though the victim has not sought restitution in 80% of the cases for which she has received notice.

By authorizing restitution without a proximate cause requirement, the *en banc* Fifth Circuit's interpretation of §2259 results in a grossly disproportionate award of restitution, such as $3.4 million, as part of a sentence for possession of two images of a victim and violates the Excessive Fines Clause of the Eighth Amendment of the United States Constitution.

The Court should reverse the *en banc* Fifth Circuit and overrule the issuance of the writ of mandamus because Amy has not demonstrated a right to the issuance of a writ that is "clear and indisputable." Despite the Government's contrary position to the District Court's ultimate factual finding on proximate causation, the District Court did not "so clearly and indisputably abuse its discretion in its decision." The opinion of the District Court should be upheld.

ARGUMENT

18 U.S.C. §2259 Requires That a Victim's Losses Be Proximately Caused By a Defendant's Conduct Before a District Court Can Order Restitution.

It is a bedrock principle of criminal law that criminal sentences should be rationally related and

proportionate to a defendant's criminal conduct.[13] Because an order of restitution is a part of a criminal sentence, it too should be subject to the same requirement. *Kelly v. Robinson,* 479 U.S. 36, 52-53 (1986). Thus, in a case in which 18 U.S.C. §2259 mandates restitution, there must be a causal relationship or nexus between the defendant's conduct and the victim's losses before a district court can order restitution.

Section 2259 is a mandatory criminal restitution statute that requires, upon application by a "victim" as that term is defined, a district court order a defendant to pay the full amount of any losses resulting from the defendant's offense conduct.

If the *en banc* Fifth Circuit is correct, then restitution in criminal sentencing will become a strict liability proposition where a defendant's offense conduct is irrelevant – not just for child exploitation offenses, but for every criminal offense with similar categories of compensable losses where restitution is mandatory. (18 U.S.C. §§1593, 2248 & 2264, all mandatory restitution statutes, that have categories of compensable losses nearly identical to those of §2259 with the identical "result of offense" language. §§2248(b)(3)(E); 2264(b)(3)(E)). Additionally, upholding

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[13] *See* Cicero's De Legibus, 106 BC; *see also* Ronen Perry, *The Role of Retributive Justice in the Common Law of Torts: A Descriptive Theory,* 73 TENN. L. REV. 177 (2006); Ronen Perry, *The Third Form of Justice*, 23 CANADIAN JOURNAL OF LAW AND JURISPRUDENCE (2010).

the *en banc* Fifth Circuit's opinion would effectively ignore the fundamental sentencing concepts that a court view the totality of a defendant's conduct in assessing punishment. 18 U.S.C. §3353(a); *United States v. Booker*, 543 U.S. 220 (2005).

I. The Purpose Of §2259, Like Any Other Criminal Restitution Statute, Is To Hold A Defendant Accountable For Specific Harms Caused By His Specific Conduct And To Restore A Victim To A Prior State Of Well Being.

Restitution is an integral part of virtually every formal system of criminal justice.[14] It is a criminal penalty that forces the defendant to confront, in concrete terms, the precise harm his actions have caused. *Kelly*, 479 U.S. at 52-53 (restitution orders imposed as part of a "criminal judgment" were not dischargeable in the same manner as personal debts in a Chapter 7 bankruptcy proceeding). Unlike traditional fines, which are payable to the Government and bear no necessary relationship to the harm caused, restitution has a more precise deterrent effect precisely because of its direct relationship between a victim's losses or damages and a defendant's punishment. *Id.* at n.10 (1986) (referencing

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[14] *United States v. Webb*, 30 F.3d 687, 689 (6th Cir.1994) (*citing* legislative history of the VWPA, S. Rep. No. 532, 97th Cong., 2nd Sess. 1, 30 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2515, 2536).

Victim Restitution in the Criminal Process: A Procedural Analysis, 97 HARV. L. REV. 931, 937-941 (1984). The legislative history of every criminal restitution statute, from the Victim and Witness Protection Act of 1982 (VWPA), to the Mandatory Victims Restitution Act (MVRA), and each amendment thereafter, Congress has increased the number of offenses subject to restitution and categories of compensable losses. Clearly, it is Congress' desire and intent to impose restitution in criminal sentences that are both punitive and compensatory in nature.[15]

Section 2259 should be interpreted as an essential part of the larger criminal sentencing scheme embodied in 18 U.S.C §3553(a). In determining restitution, a sentencing court should first look to U.S.S.G. §5E1.1 which authorizes restitution for the full amount of the victim's losses if authorized under 18 U.S.C. §§1593, 2248, 2259, 2264 and other statutes. After the passage of the MVRA which includes §§2248, 2259 and 2264, the Administrative Office of the United States Courts instructed probation officers to employ a five-step analysis to determining restitution, which required the officer to: (1) identify the statutory offense of conviction; (2) identify the victims of the offense of conviction; (3) identify the harms to the victims caused by the offense of conviction; (4)

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[15] Brian Kleinhaus, *Serving Two Masters: Evaluating the Criminal or Civil Nature of the VWPA and MVRA Through the Lens of the Ex Post Facto Clause, the Abatement Doctrine, and the Sixth Amendment*, 73 FORDHAM L. REV. 2711, 2715 (2005).

identify which harms or costs are compensable as restitution; and (5) consider the effect of plea agreements on restitution amounts. Catherine M. Goodwin, *The Imposition of Restitution in Federal Criminal Cases*, FEDERAL PROBATION, p. 5 (June 2001). A district court must recognize that, central to restitution, is the idea of restoring a victim, to the extent money can do so, to the position occupied before a defendant's offense conduct and any resulting injury. *Hughey v. United States*, 495 U.S. 411, 416 (1990); *United States v. Pescatore*, 637 F.3d 128 (2d Cir.2011).

II. An Accurate Application Of The Canons Of Statutory Construction Require A Causal Relationship Or Nexus Between A Defendant's Conduct And A Victim's Losses *Before* Restitution Can Be Awarded.

A. The Plain Language of the Statute Clearly Suggests That the Government Establish a Causal Connection Between a Defendant's Offense Conduct and a Victim's Losses or Damages.

The starting point in interpreting the construction, meaning and application of a statute is the language itself. *Kelly*, 479 U.S. at 43 (*quoting Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975)). Courts must not be guided "'"by a single sentence or member of a sentence, but should look to the provisions of the whole law, and to its object and policy."'" *Id.* (*quoting Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222 (1986)). *See Bailey v.*

United States, 516 U.S. 137, 145 (1995); *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (*citing Shell Oil Co. v. Iowa Dept. of Revenue*, 488 U.S. 19, 26 (1988)). "'Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used.'" *King*, 502 U.S. at 221 (*quoting NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir.1941) (L. Hand, J.)).

When general words follow, or are surrounded by, specific words, the general words are to be understood in light of the specific terms. *See Hughey*, 495 U.S. at 419. If the aforementioned rules of construction are applied to §2259, the phrase "any other losses suffered by the victim as a proximate result of the offense" in §2259(b)(3)(F) must mean that the other enumerated losses in (b)(3)(A-E) must also be suffered as a proximate result of the offense.

The Court must assume the legislative purpose is expressed by the ordinary meaning of the words used. Absent a clearly expressed legislative intent to the contrary, the statutory language must be regarded as conclusive. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982).

> Perhaps no interceptive fault is more common than the failure to follow the whole-text cannon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and

logical relation of its many parts. Sir Edward Coke explained the canon in 1628:

> "[I]t is the most natural and genuine exposition of a statute to construe one part of the statute by another part of the same statute, for that best expressed the meaning of the makers." Coke added: "If any sections, and finding out the sense of one clause by the words or obvious intent of the other." In more modern terms, the California Civil Code states, with regard to private documents: "The whole of a contract is to be taken together, as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."

Context is a primary determinant of meaning. A legal instrument typically contains many interrelated parts that make up the whole. The entirety of the document thus provides the context for each of its parts. When construing the United States Constitution in *McCulloch v. Maryland*, Chief Justice John Marshall rightly called for a "fair construction of the whole instrument." More than a century later, Justice Benjamin Cardozo echoed the point in the context of legislation: "[T]he meaning of a statute is to be looked for not in any single section, but in all the parts together and in their relation to the end in view."

ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, 167-68 (2012) (internal citations omitted).

1. The statutory definition of "victim" in §2259 plainly suggests a finding of causation before restitution can be ordered.

Under §2259, "The order of restitution under this section shall direct the defendant to pay the victim (through the appropriate court mechanism) the full amount of the victims's losses. . . ." 18 U.S.C. §2259(b)(1). "Victim" is defined as " . . . the individual harmed as a result of a commission of a crime under this chapter." 18 U.S.C. §2259(c). Both 18 U.S.C. §2248 (Sexual Abuse) and 18 U.S.C. §2264 (Domestic Violence and Stalking) employ the same definition of "victim." Other restitution statutes, by contrast, define victim more broadly, as " . . . a person directly and proximately harmed as a result of the commission of an offense" for which restitution can be ordered. 18 U.S.C. §3663(a)(2) (emphasis added); *see also id.* §3663A(a)(2); *id.* §2327(c). Significantly, Congress has repeatedly used the "result of" language in defining a victim's relationship to an offense for the purposes of restitution. This Court has explained that the meaning of "results of" "is naturally read simply to impose the requirement of causal connection." *Brown v. Gardner*, 513 U.S. 115, 119 (1994) (assuming that proximate causation applies to veterans' compensation statute). Numerous courts

have likewise held that similar language requires causation.[16]

The fact that the list of examples of what can form the basis of restitution awards is prefaced by an announcement that these examples are meant to illustrate the term "full amount of the victim's losses" further links them to this causation requirement. 18 U.S.C. §2259(b)(3). Restitution awards under 18 U.S.C. §2259(b)(2) must be made in accordance with 18 U.S.C. §3664, through which the awards are enforced. Section 3664 contains references to "the loss sustained by a victim as a result of the offense." 18 U.S.C. §3664(e).

In criminal statutes, the phrase "results from" requires both "but for" and proximate causation. As Professor LaFave explains, when crimes are defined "to require not merely conduct but also a specified *result* of conduct, the defendant's conduct must be the 'legal' or 'proximate' cause of the result." 1 Wayne R. LaFave, *Substantive Criminal Law* §6.4 at 464 (2d ed. 2003) (emphasis added). In other words, "it must

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[16] *See also CNG Transmission Mgmt. VEBA v. United States*, 588 F.3d 1376, 1379 (Fed. Cir.2009) ("The plain meaning of the term 'result in' is causes."); *Black Hills Aviation, Inc. v. United States*, 34 F.3d 968, 975 (10th Cir.1994) (holding that "use of the plain language – 'as a result of – is logically interpreted to mean "caused by" . . . not connected with' "); *Am. Ins. Co. of City of Newark, N.J. v. Keane*, 233 F.2d 354, 360 (D.C. Cir.1956) (defining the verb "result" as "[t]o proceed, spring, or arise as a consequence, effect, or conclusion") (*quoting* MERRIAM-WEBSTER NEW INTERNATIONAL DICTIONARY (2d ed. 1953)).

be determined that the defendant's conduct was the cause in fact of the result, which usually . . . means that but for the conduct the result would not have occurred." *Id.* And, "[i]n addition, even when cause in fact is established, it must be determined that any variation between the result intended . . . or hazarded . . . and the result actually achieved is not so extraordinary that it would be unfair to hold the defendant responsible for the actual result." *Id.*

As the Second Circuit stated:

> [P]roximate cause is a deeply rooted principle in both tort and criminal law that Congress did not abrogate when it drafted § 2259. *See Monzel,* 641 F.3d at 535-36; *United States v. U.S. Gypsum Co.,* 438 U.S. 422, 437 (1978) ("Congress [is] presumed to have legislated against the background of our traditional legal concepts which render [proximate cause] a critical factor, and absence of contrary direction" here "[is] taken as satisfaction [of] widely accepted definitions, not as a departure from them." (*quoting Morissette v. United States,* 342 U.S. 246, 263 (1952)).

Aumais, 656 F.3d at 153.

The Second Circuit found little reason to conclude that Congress intended to eliminate a proximate cause requirement from §2259.

The Ninth Circuit applied the "whole text cannon" in finding a proximate cause requirement between

the restitution order and the defendant's crime in its reading of §2259. In *United States v. Laney,* 189 F.3d 954, 965 (9th Cir.1999), the court stated that the definition of "victim" in §2259(c), i.e., "the individual harmed as a result of a commission of a crime under this chapter," created a requirement for a nexus between the harm to the victim and the defendant's crime. *Id.* at 965. The court therefore applied the proximate cause requirement to all classes of injury in §2259(b)(3) based on that definition. The *Laney* Court did not find it necessary to parse commas versus semicolons or debate grammar.

Laney's interpretation that a victim is an individual harmed by *a* commission of a specific crime is consistent with the traditional forms of restitution and a fair reading of the entire statute. Under a fair reading of §2259(c), Amy is the victim of *a* crime and is entitled to restitution from Paroline for harm caused by *his* crime, not some other person's crime or crimes.[17]

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[17] In the instant case, Amy's uncle who sexually abused her and created the child pornography to distribute on the internet was ordered to pay $6,000 in restitution. It is incongruous that persons who simply possessed two of the images he created would be ordered to pay $3.4 million in restitution.

2. When read within the context of other mandatory criminal restitution statutes, §2259 must be interpreted to have a causation requirement.

The MVRA enacted sweeping changes to the restitution process, amending the permissive restitution statute, §3663, adding the general mandatory restitution statute, §3663A, and amending the existing mandatory restitution statutes, §§2248, 2259 & 2264, to reflect a cohesive scheme to assist victims of sexual abuse, child exploitation and domestic violence. S. Rep. No. 104-179 (1995).[18] At the same time that §103 of the MVRA added §3663A and amended §3663, §104 amended the mandatory restitution provisions of §§2248, 2259 & 2264 to conform with one another. Congress stated that "this section is intended by the committee to conform the mandatory and permissive restitution provisions in current law to the provisions of this act." *Id.* at 30. Section 105 of the MVRA made all restitution provisions under §§103 and 104 subject to the consolidated procedural requirements, including enforcement, of 18 U.S.C. §3664. *Id.* Congress clearly intended the MVRA to

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[18] The "directly and proximately" language was added to §3663(a)(2) at the same time Congress amended §2259 with respect to its procedural provisions, *see* Antiterrorism and Effective Death Penalty Act, §205, 110 Stat. at 1229-31, but Congress expressly declined to alter the definition of victim under §2259; *see* S. Rep. No. 104-179 at 14 (1995) ("No change is made to the scope of restitution required under the Violence Against Women Act provisions. . . .").

create a uniform scheme for ordering restitution in criminal cases. The intent was to bring the permissive and mandatory restitution statutes into conformity with one another and to ensure that the mandatory restitution provisions apply only where the named, identifiable victim suffers a physical injury or pecuniary loss directly and proximately caused by a defendant's offense conduct. *See United States v. Perry*, 360 F.3d 519, 524 (6th Cir.2004).

The *en banc* Fifth Circuit did not consider that two restitution statutes enacted in the same bill as §2259 – 18 U.S.C. §2248 and §2264 – have categories of compensable losses nearly identical to those of §2259, but also include "any costs incurred in obtaining a civil protection order." *Id.* §2248(b)(3)(E); §2264(b)(3)(E). The language used by Congress in §§2248(a)(3)(F) and 2264(a)(3)(F) use the same "proximate result of the offense" language found in §2259(a)(3)(F).

Similarly, 18 U.S.C. §1593, which provides restitution for peonage, slavery, and human trafficking offenses, expressly incorporates the definition of "full amount of the victim's losses" used in §2259, but includes "in addition . . . the greater of the gross income or value to the defendant of the victim's services or labor or the value of the victim's labor as guaranteed under the minimum wage and overtime guarantees of the Fair Labor Standards Act." §1593(b)(3).

Because these statutes have the same categories of compensable losses and use the same catchall proximate result language as §2259, then they too must me interpreted in the same manner. If the *en banc* Fifth Circuit is correct, then defendants convicted under each of these statutes will be strictly liable for mandatory restitution, irrespective of their offense conduct.

3. Congress is presumed to understand the common meaning of terms used.

By adopting a mandatory restitution statute, Congress is presumed to have understood the context of the meaning of the terms used, their common law meaning and the application of those terms. *Morissette,* 342 U.S. at 263; *Neder v. United States*, 527 U.S. 1, 23 (1999) ("It is a settled principle of interpretation that, absent other indication, Congress intends to incorporate the well-settled meaning of the common-law terms it uses."). The specific language of §2259 requires a determination that all losses or damages suffered by a victim, as the statute defines that term, must have been proximately caused by the defendant's offense conduct. The relationship between restitution and a defendant's conviction was addressed in *Hughey,* 495 U.S. at 419. The Court interpreted the restitution provisions of the VWPA, 18 U.S.C. §§3579, 3580 (1982 ed. and Supp. IV). The Court held that the language and structure of the Act makes plain Congress' intent to authorize an award of restitution for the loss caused by the specific

offense conduct. When the Court attempted to limit restitution stemming from the crime of conviction, Congress responded by amending the VWPA to authorize restitution for all of a defendant's offense conduct. This amendment is consistent with the concept of criminal sentencing for all of a defendant's relevant conduct as required by U.S.S.G. §1B1.3.

B. The Fifth Circuit Erred When It Applied *Barnhart v. Thomas*, 540 U.S. 20 (2003), Because It Failed to First Employ the Primary Tools of Statutory Construction.

In this case, the *en banc* Fifth Circuit failed to consider the full language of §2259 and construed the plain language of §2259(b)(1) as requiring a restitution order for all losses enumerated in §2259(b)(1)(A-E) without regard to the existence of proximate cause between the defendant's actions and the losses incurred by the victim. The *en banc* Fifth Circuit determined that once a person was determined to be a victim as defined by §2259(c), any proximate cause requirement applies only to §2259(b)(1)(F) "any other losses suffered by the victim as a proximate result of the offense." *In re Amy*, 701 F.3d at 762.

In doing so, the *en banc* Fifth Circuit relied on this Court's holding in *Barnhart*, 540 U.S. at 26, holding that a limiting clause or phrase should be read as modifying only the noun or phrase it immediately follows. The Fifth Circuit misapplied *Barnhart*

which must be limited in its application to a federal agency's "reasonable" interpretation of the agency's application of a statute. *Barnhart* should not apply to the interpretation and application of §2259.

In this case, the *en banc* Fifth Circuit ignored the plain language of all of §2259 and its relationship to other restitution statutes. Applying the rule of the last antecedent to §2259(b)(3)(F) to exclude proximate cause from §2259(b)(3)(A-E) would require the Court to accept the unlikely premise that Congress intended to jettison decades of jurisprudence requiring that proximate cause be established before a criminal defendant can be ordered to pay restitution to a crime victim. It is more likely that Congress structured §2259(b)(3) to broadly define the types of losses for which a victim of a Chapter 110 offense can receive restitution. *See United States v. Hayes*, 555 U.S. 415, 423 (2009). The *en banc* Fifth Circuit ignored the entirety of the statute and ignored *Barnhart's* specific acknowledgment that the "rule of last antecedent" does not apply when a contrary interpretation of the statute appears. *Id.* at 26. "Where no contrary intention appears, refer solely to the last antecedent. While this rule is not an absolute and can assuredly be overcome by other indicia of meaning, the Court has stated that construing a statute in accord with the rule is quite sensible as a matter of grammar." *Nobelman v. American Savings Bank,* 508 U.S. 324, 330 (1993); *Barnhart,* 540 U.S. at 26. The rationale of *Barnhart* is inapplicable to any statutory interpretation of §2259 because the entire text of §2259 includes

a causation requirement from its definition of victim as well as its cross reference to §§3663, 3663a and 3664. Moreover, the issue of proximate cause in criminal restitution is a bedrock principle that is found in all restitution statutes.

C. The Court's Holding in *Porto Rico Railway, Light & Power Co. v. Mor*, 253 U.S. 345 (1920) Requires a Determination of a Victim's Losses Enumerated in §2259(b)(3)(A-F) Be Based on Proximate Cause.

In *Porto Rico Railway, Light & Power Co. v. Mor*, the Court construed a jurisdictional statute[19] similar in structure to §2259. The Court held the phrase "not domiciled in Porto Rico" applied to all of the categories of persons included in the phrase "citizens of a foreign State or States, or citizens of a State, Territory or Districts of the United States." *Id.* at 348. The Court explained that when several words are followed by a clause which is applicable as much to

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[19] The provision contained in §41 of the so-called Jones Act of March 2, 1917, c. 145, 39 Stat. 951, 965, interpreted in *Porto Rico Railway, Light & Power Co.*, 253 U.S. at 346, is as follows:

> Said district court shall have jurisdiction of all controversies where all of the parties on either side of the controversy are citizens or subjects of a foreign State or States, or citizens of a State, Territory, or District of the United States not domiciled in Porto Rico, wherein the matter in dispute exceeds, exclusive of interest or cost, the sum or value of $ 3,000. . . .

the first and other words as to the last, the natural construction is to read the clause as applicable to all. *Id.*; *see United States v. Bass*, 404 U.S. 336 (1971).

In *Bass,* the Court interpreted 18 U.S.C. App. §1202(a). In pertinent part, that statute reads:

> Any person who – "(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony . . . and who receives, possesses, or transports in commerce or affecting commerce . . . any firearm shall be fined not more than $ 10,000 or imprisoned for not more than two years, or both."

The Court noted that while the statute does not read well, "the natural construction of the language" suggests that the clause "in commerce or affecting commerce" qualifies all three antecedents in the list based on *Porto Rico Railway, Light & Power Co. See Bass,* 404 U.S. at 340. The Court held that because the phrase "in commerce or affecting commerce" undeniably applies to at least one antecedent, and since it makes sense with all three, the more plausible construction here is that it in fact applies to all three. It is far more likely that the phrase was meant to apply to "possesses" and "receives" as well as "transports." As the court below noted, the inclusion of such a phrase "mirror[s] the approach to federal criminal jurisdiction reflected in many other federal statutes." *Id.* 404 U.S. at 346.

The *en banc* Fifth Circuit rejected the Court's holding in *Porto Rico Railway* based on the structure

of §2259(b)(3). Section 2259(b)(3) consists of six subsections containing a numbered clause with the subsections separated by semicolons rather than a single long sentence as in *Porto Rico Railway*.[20] The *en banc* Fifth Circuit held the proximate cause requirement applied only to the last subsection, a catchall for all other injuries not listed in the other subsections. *In re Amy*, 701 F.3d at 763. Judge Davis in his dissent would hold the court was bound by *Porto Rico Railway* and he wrote that the use of semicolons rather than commas was irrelevant because either could be used grammatically. *Id.* at 777 n.3 (Davis, J, dissenting).

The *en banc* Fifth Circuit's erred by ignoring *Porto Rico Railway* while focusing on whether commas or semicolons were used to separate subsections in §2259(b)(3). Unlike the Ninth Circuit in *Laney*, the *en banc* Fifth Circuit erred in focusing on only a part of the statute rather than reading the statute as a whole. The *en banc* Fifth Circuit failed to interpret §2259 as requiring restitution only for the defendant's criminal acts.

In *McDaniel*, 631 F.3d at 1209, the Eleventh Circuit stated that the application of *Porto Rico*

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[20] Section 2259(b)(4)(b)(ii) forbids district courts to decline issuing restitution orders because of "the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance *or any other source.*" (emphasis added). "Any other source" would include other restitution orders.

Railway to its interpretation of §2259(b)(3) is further supported by the procedures for issuing and enforcing restitution orders. Section 2259(b)(2) expressly incorporates the procedures of 18 U.S.C. §3664, stating that "[a]n order of restitution under this section shall be issued and enforced in accordance with § 3664 in same manner as an order under section 3663A." Section 3664(e) states unequivocally that "[t]he burden of demonstrating the amount of the loss sustained by a victim as a *result of the offense* shall be on the attorney for the Government." 18 U.S.C. §3664(e) (emphasis added). The Eleventh Circuit recognized that "[I]t is . . . a familiar canon of statutory construction that [catchall] clauses are to be read as bringing within a statute categories similar in type to those specifically enumerated." *McDaniel*, 631 F.3d at 1208-09; *see also Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726, 734 (1973).

The fact that §2259 enumerates those losses "bears emphasis because at the same time Congress enacted § 2259, it enacted another restitution statute that did not enumerate categories of losses." *Kearney*, 672 F.3d at 97 n.13. Instead, that statute "stated that 'the term "full amount of the victims losses" means all losses suffered by the victim as a proximate result of the offense.'" *Id.* (footnote omitted) (*quoting* Pub. L. 103-322, §250002, 108 Stat. 2082, 2083) (codified at 18 U.S.C. §2327(b)(3)). And all of the restitution statutes enacted by Congress in 1996 provide "losses suffered by the victim as a proximate result of the offense." 18 U.S.C. §§2248, 2264.

The Second Circuit in *United States v. Hayes*, 135 F.3d 133, 137-33 (2d Cir. 1998), applied *Porto Rico Railway* to 18 U.S.C. §2264(b)(3), which is identical to §2259(b)(3), except that its subsection (E) reads: "attorneys' fees, plus any costs incurred in obtaining a civil protection order." The Second Circuit held, "Reading [sub]section 2264(b)(3)(E) together with [sub]section 2264(b)(3)(F), attorneys' fees and costs of obtaining a protection order are among the 'losses suffered by the victim as a proximate result of the offense.'" *Id.* at 138. The Second Circuit stated that §2264(b)(3) "authorizes restitution" for the specific losses in subsections 2264(b)(3)(A-E). *See id.* The "proximate result" clause in the last subsection 2264(b)(3)(F) shows that Congress considered the costs in subsections 2264(b)(3)(A-E) "among the losses that are proximately caused by the offense," but that causation still must be proved in each case. *Id. Accord, Kearney*, 672 F.3d at 97 (the "express inclusion [of the specific losses in subsections 2259(b)(3)(A-E)] . . . indicates that Congress believed such damages were sufficiently foreseeable to warrant their enumeration in the statute."); *see also United States v. Gamble*, 709 F.3d 541, 553 (6th Cir.2013) ([T]he list of recoverable losses that the statute provides confirms the breadth of what is a foreseeable consequence of defendants' actions.).

Variances among these restitution statutes "demonstrate that Congress viewed particular offenses as causing foreseeable risks of certain losses [meriting enumeration] in the[se] [restitution] statutes."

Kearney, 672 F.3d at 97 n.13. The First Circuit concluded that, although Congress determined that restitution offenses foreseeably cause the losses in subsections (A) through (E), the defendant – to be liable – still must proximately cause the victim's losses. *Id.* at 95-97, 99-100.

D. If This Court Finds §2259 Is Ambiguous After Applying These Canons of Statutory Construction, the Legislative History Clearly Reveals Congress' Intent That Orders of Restitution Be Predicated on a Finding of Proximate Causation.

Through the MVRA, Congress intended to create a streamlined process that only awarded restitution to all identifiable victims suffering any actual losses. Section 103 of the MVRA added the mandatory restitution statute, §3663A, and amended §3663, so that both sections defined "victim" as "2) . . . a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered[.]" 18 U.S.C. §§3663, 3663A.

As noted by the Fourth Circuit:

> To the extent that Congress has addressed the matter of causation in the restitution statute, Congress has suggested that proximate causation is a feature of the legislation. A Senate committee report on the bill setting forth the language of the restitution statute contained the following comment:

> **"Mandatory restitution: This section requires sex offenders to pay costs incurred by victims as a proximate result of a sex crime."** S. Rep. No. 103-138, at 56 (1993); *see Kearney,* 672 F.3d at 96 n.11 (noting same).

Burgess, 684 F.3d at 458. (emphasis added)

In enacting the MVRA, Congress expressed its intent to require proximate causation for mandatory restitution:

> [T]he committee amendment requires that there be an identifiable victim who suffers a physical injury or pecuniary loss before mandatory restitution provisions would apply. The committee intends this provision to mean . . . **that mandatory restitution provisions apply only in those instances where a named, identifiable victim suffers a physical injury or pecuniary loss directly and proximately caused by the course of conduct under the count or counts for which the offender is convicted.**

S. Rep. No. 104-179 at 29-30 (emphasis added).

In *United States v. Pescatore*, 637 F.3d 128 (2d Cir.2011), the Court noted that the MVRA mandates that restitution be ordered to crime victims for the "full amount" of losses caused by a defendant's criminal conduct. *See* 18 U.S.C. §3664(f)(1)(A); *United States v. Boccagna,* 450 F.3d 107, 115 (2d Cir.2006);

United States v. Reifler, 446 F.3d 65, 137 (2d Cir.2006).

There is nothing in the legislative history of §§2248, 2259 or 2263 to suggest that Congress intended to eviscerate the long-standing principle that restitution ordered for a defendant is to be based on harm proximately caused by the conduct of conviction.

E. The Application of the Rule of Lenity to §2259 Requires That the Government Establish Proximate Cause Between the Defendant's Conduct Underlying a Conviction and a Victim's Losses or Damages Before a Restitution Order Can Be Entered.

If the wording of the statute, its context and its legislative history are not sufficiently clear to properly construe §2259, the Court should apply the Rule of Lenity, that is, when there is ambiguity concerning the ambit of criminal statutes, they are resolved in favor of lenity. *Bass* at 347 (*citing Rewis v. United States,* 401 U.S. 808, 812 (1971)). The *Bass* Court described the Rule of Lenity as requiring that when there is a choice between two statutory constructions, it is appropriate for the Court before choosing the harsher construction to require "that Congress should have spoken in language that is *clear and definite.*" *Id.* (Emphasis added).

In their interpretation of §2259, a plurality of courts have employed an overlay of traditional tort principles to the statutory language to resolve the ambiguity of the restitution statute. *Burgess,* 684 F.3d at 457. As noted by the Seventh Circuit in *Laraneta,* 700 F.3d at 989,

> either the "last antecedent" canon as defined by *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) or the "series-qualifer" canon defined by *Porto Rico Railway, Light & Power Co. v. Mor*, 253 U.S. 345, 348 (1920) could be the basis for interpreting the meaning of §2259. When applying both canons, the statute obtains two distinct conflicting meanings.

The language of §2259 regarding a causal requirement is ambiguous when read in view of *Barnhart* and *Porto Rico Railways*. Therefore, the Rule of Lenity must apply. Further, the discretionary restitution statutes, 18 U.S.C. §3663, and 18 U.S.C. §3663A, unlike §2259, specify that proximate cause must be found for a sentencing court to award restitution by defining "victim" as follows:

> For purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered[.] 18 U.S.C. §§ 3663, 3663A (emphasis added).

This clarity does not exist in §2259. Instead, §2259 defines "victim":

> (c) Definition. – For purposes of this section, the term "victim" means the individual harmed as a result of a commission of a crime under this chapter.

The possible ambiguity within the statute revolves around the meaning of "the result of the offense" contained in 18 U.S.C. §2259(3)(F) and the definition of "victim". In context, the phrases "as a result of" and "as a proximate result of" are unclear. *See United States v. Hardy,* 707 F.Supp.2d 597, 607 (W.D. Pa. 2010).

To the extent that any ambiguity remains in statutory construction, the Court in *Bass*, *Rewis* and *Hughey* applied the Rule of Lenity. If there are two possible constructions of a statute, the one most favorable to the defendant should be chosen. As the Court held in *United States v. Santos,* 553 U.S. 507, 515 (2008):

> When interpreting a criminal statute, we do not play the part of a mindreader. In our seminal rule-of-lenity decision, Chief Justice Marshall rejected the impulse to speculate regarding a dubious congressional intent. "[P]robability is not a guide which a court, in construing a penal statute, can safely take." *United States v. Wiltberger*, 18 U.S. 76, 5 Wheat. 76, 105, 5 L. Ed. 37 (1820). And Justice Frankfurter, writing for the Court in another case, said the following: "When

> Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity." *Bell v. United States,* 349 U.S. 81, 83, 75 S. Ct. 620, 99 L. Ed. 905 (1955).

When the Court construed a restitution statute in *Hughey*, it applied the rule of lenity:

> Even were the statutory language regarding the scope of a court's authority to order restitution ambiguous, longstanding principles of lenity, which demand resolution of ambiguities in criminal statutes in favor of the defendant, *Simpson v. United States,* 435 U.S. 6, 14-15, 98 S. Ct. 909, 913-14, 55 L. Ed.2d 70 (1978) (applying rule of lenity to federal statute that would enhance penalty), preclude our resolution of the ambiguity against petitioner on the basis of general declarations of policy in the statute and legislative history. *See Crandon v. United States,* 494 U.S. 152, 160, 110 S. Ct. 997, 1002, 108 L.Ed.2d 132 (1990) ("Because construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text.")

495 U.S. at 422.

The text of §2259 does not clearly warrant discarding the proximate cause requirement found in all other restitution statutes. The "touchstone of the rule of lenity is statutory ambiguity." *Bifulco v.*

United States, 447 U.S. 381, 387 (1980). The rule is applied only when, after consulting traditional canons of statutory construction, a court is left with an ambiguous statute. *United States v. Shabani*, 513 U.S. 10, 17 (1994). *See also United States v. Fisher*, 2 Cranch 358, 386 (1805) (Marshall, C.J.); *Bass*, 404 U.S. at 347.

Lenity in construing statutes gives effect to two bedrock principles. First, there should be clear warnings as to what the law will do when certain lines are crossed. To make the warnings fair, so far as possible the line should be clear. Second, legislatures and not courts should define criminal activity. The latter embodies the "instinctive distaste against men languishing in prison unless the lawmakers have clearly said they should." Thus doubts are resolved in favor of the defendants. *Bass*, 404 U.S. at 348. The application of the rule of lenity to §2259 requires a proximate cause requirement between the conduct of conviction and any order for restitution for damages arising from the conduct underlying the offense of conviction.

III. Proximate Causation Is The Only Appropriate Causal Relationship Or Nexus Required To Be Proven By The Government Under §2259.

A. Proximate Cause Is an Indispensable Element of Criminal Restitution.

It is apparent from the plain language, context, and legislative history of §2259 that, although it is a

criminal statute, it "functions much like a tort statute by directing the court to make a victim whole for losses caused by the responsible party." *Monzel,* 641 F.3d at 535 n.5. Section 2259's intent is to make a victim of sexual exploitation whole for losses or damages that *result* from the commission of a specific offense. In interpreting §2259, the D.C. Circuit reasoned:

> It is a bedrock rule of both tort and criminal law that a defendant is only liable for harms he proximately caused. *See* Restatement (Third) of Torts: Liability For Physical and Emotional Harm § 26 cmt. a (2010) (calling proximate cause a "requirement[ ] for liability in [548] tort"); W. Page Keeton et al., Prosser and Keeton on The Law of Torts § 41, at 263 (5th ed. 1984) ("An essential element of the plaintiff's cause of action for negligence, or . . . any other tort, is that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered. This connection usually is dealt with by the courts in terms of what is called 'proximate cause'. . . ."); Wayne R. Lafave, Substantive Criminal Law § 6.4, at 464 (2d ed. 2003) ("[For] crimes so defined as to require not merely conduct but also a specified result of conduct, the defendant's conduct must be the 'legal' or 'proximate' cause of the result."); *see also id.* § 6.4(c), at 471 ("The problems of [proximate] causation arise in both tort and criminal settings, and the one situation is closely analogous to the other. . . . [T]he

> courts have generally treated [proximate] causation in criminal law as in tort law. . . ."). The purpose of this rule is clear: "legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability." KEETON ET AL., *supra*, § 41, at 264.

The D.C. Circuit concluded that §2259 as a restitution statute incorporates the traditional requirement of proximate cause unless there is good reason to think Congress intended the requirement not to apply. *See Sherwood Bros. v. District of Columbia*, 113 F.2d 162, 163 (D.C. Cir.1940) (finding it "reasonable . . . to assume" that where a common law rule "has become embedded in the habits and customs of the community, . . . Congress had the common-law rule in mind when it legislated"). *Monzel*, 641 F.3d at 536. *See also U.S. Gypsum Co.*, 438 U.S. at 437 (Congress is presumed to have legislated against the background of our traditional legal concepts and, absent language signaling a departure, those concepts ought to be employed.).

Proximate cause in the criminal context means after "but for" cause is established, that criminal defendants should only be held liable for the foreseeable results of their actions. Foreseeability is generally defined as "whether any ordinarily prudent man would have foreseen that damage would probably result from *this act*." *Consol. Aluminum Corp. v. C.F. Bean Corp.*, 833 F.2d 65, 67 (5th Cir.1987) (*quoting*

F. James & R. Perry, *Legal Cause*, 60 YALE L.J. 761, 786 (1951)) (detailing definitions of foreseeability and their origin). "The purpose of this rule is clear: 'legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability.'" *Monzel*, 641 F.3d at 535-36 (*quoting* W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON LAW OF TORTS at 264 (5th ed. 1984)). Throughout these proceedings, the Government has agreed that §2259 requires a showing of proximate cause. The conflict between Paroline and the Government has been over the quantum of proof necessary to establish the necessary link between his conduct and the proven losses or damages presented in this case.

In the context of §2259, the determination of individual foreseeability should be based on the application of a substantial factor test. As Professor LaFave points out, the substantial factor test only applies to situations where "two causes, each alone sufficient to bring about the harmful result, operate together to cause it." LaFave, §6.4(b) at 468. *Monzel*, 641 F.3d at 536-37. "[A] 'general' causation requirement without a subsidiary proximate causation requirement is hardly a requirement at all," because "[s]o long as the victim's injury would not have occurred but for the defendant's offense, the defendant would be liable for the injury." *Monzel*, 641 F.3d at 536-37 n.8 (*citing Amy Unknown*, 636 F.3d at 200).

"[E]valuated in light of its common-law foundations[,] proximate cause . . . requires 'some direct relationship between the injury asserted and the injurious conduct alleged.'" *Hemi Group, LLC v. City of New York*, 559 U.S. 1, 8-9 (2010) (*quoting Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992)). "A link that is 'too remote,' 'purely contingent,' or 'indirec[t]' is insufficient." *Id.* (*quoting Holmes*, 503 U.S. at 271, 274). Without the limitation such a link provides, liability would attach to all sorts of injuries a defendant might indirectly cause, no matter how "remote" or tenuous the causal connection. *Id.*; *see also* KEETON, §41, at 266 (explaining that "the mere fact of causation, as distinguished from the nature and degree of the causal connection, can provide no clue of any kind to singling out those [who] are to be held legally responsible," for "once events are set in motion, there is, in terms of causation alone, no place to stop" (emphasis added)). *See also Pac. Operators Offshore, LLP v. Valladolid*, ___ U.S. ___, 132 S. Ct. 680, 692 (2012) (Scalia, J. concurring) (The term "proximate cause" is shorthand for a concept: Injuries have countless causes, and not all should give rise to legal liability. *Citing* to W. KEETON, D. DOBBS, R. KEETON & D. Owen, PROSSER AND KEETON ON LAW OF TORTS §42, p. 243 (5th ed. 1984)). *CSX Transp., Inc. v. McBride*, 564 U.S. ___, 131 S. Ct. 2630, 2637 (2011). As the Court has repeatedly stated

> Life is too short to pursue every event to its most remote, "but-for," consequences, and the doctrine of proximate cause provides a

> rough guide for courts in cutting off otherwise endless chains of cause-and-effect.

Holmes, 503 U.S. at 287.

It is conceivable that Congress would intend that those who violate child sex exploitation laws should pay restitution for such attenuated harms, but it seems unlikely it did so here – particularly when Congress employed the same language in 18 U.S.C. §§2248 and 2264 as it did in §2259. However, "[i]f Congress really had wished [courts to award restitution for losses defendants did not proximately cause], it could have provided that. It would, however, take a very clear provision to convince anyone of anything so odd." *Field v. Mans*, 516 U.S. 59, 68 (1995).

B. Restitution Pursuant to §2259 Must Be Limited to Harms a Defendant Proximately Caused.

Interpretation and application of the concept of proximate cause must be consistent with the congressional purpose of §2259 of ensuring full compensation of losses for the victims of child pornography distribution and possession. This is a timeless principle of statutory interpretation. *Dolan v. United States*, ___ U.S. ___, 130 S. Ct. 2533, 2539, 177 L.Ed.2d 108 (2010) (interpreting the 90-day requirement of 18 U.S.C. §3664(d)(5) in light of the fact that "the statute seeks primarily to assure that victims of a crime receive full restitution").

In calculating the dollar figure owed in restitution, the district court need only make a "reasonable determination of appropriate restitution." *United States v. Innarelli*, 524 F.3d 286, 294 (1st Cir.2008) (*quoting United States v. Vaknin*, 112 F.3d 579, 587 (1st Cir.1997)) (internal quotation marks omitted). "Absolute precision" is not required. *Id.* (*quoting United States v. Burdi*, 414 F.3d 216, 221 (1st Cir.2005)) (internal quotation marks omitted). Moreover, the district court has leeway to "resolve uncertainties 'with a view towards achieving fairness to the victim.'" *Id.* (*quoting Vaknin*, 112 F.3d at 587). And, in terms of §2259, the courts of appeals have recognized that "some degree of approximation" is acceptable and that "mathematical precision" is not required. *Monzel*, 641 F.3d at 540 (*quoting United States v. Doe*, 488 F.3d 1154, 1160 (9th Cir.2007)).

Because restitution awards under §2259 are limited to harms the defendant proximately caused, some evidence must be presented that shows that "but for" a defendant's conduct, the losses or damages would not have occurred. In the instant case, the Government and Amy have presented evidence that Amy suffered losses stemming from her sexual exploitation as a child and argued persuasively that possession of child pornography causes harm to the minors depicted (*see New York v. Ferber*, 458 U.S. 747, 758-60 (1982)).

However, there has been no showing that any of Amy's losses that are traceable to Paroline's conduct. Amy has argued at length that the causes of her

injuries cannot reasonably be divided among the unknown number of possessors and distributors of her images and that Paroline is therefore jointly and severally liable with other possessors and distributors for the full amount of her losses. *See* RESTATEMENT (THIRD) OF TORTS §12 (2000) ("Each person who commits [an intentional tort] is jointly and severally liable for any indivisible injury legally caused by the tortious conduct."); KEETON, §52, at 347 ("[E]ntire liability rests upon the obvious fact that each has contributed to the single result, and that no reasonable division can be made."). But the very sources upon which Amy relies undermine her argument. Prosser, whom she quotes at length, states that "[s]uch entire liability is imposed" where two or more causes produce a single "result" and "either cause would have been sufficient in itself" to produce the result or each was "essential to the injury." KEETON, §52, at 347.

Amy's profound suffering is due in large part to her knowledge that each day, untold numbers of people across the world are viewing and distributing images of her sexual abuse. J.A. 71. Yet, based on her stipulation, none of her losses or damages result from her knowledge of Paroline's conduct. J.A. 230. Paroline's possession of two images of Amy was neither a necessary nor a sufficient cause of all of her losses. She has suffered tremendously from her uncle's abuse regardless of what Paroline did. *See also* KEETON, §52, at 346 ("entire liability" is generally not imposed "where there is [a] factual basis for

holding that [the] wrongdoer's conduct was not a cause in fact of part of the harm").

Amy's claim for restitution is undermined by her withdrawing restitution claims in 80% of the cases for which she received notice. J.A. 158. And the expert reports and victim impact statement submitted as the supporting documentation underlying her claim for restitution were complete by November 18, 2008 (J.A. 67) nearly two months prior to Paroline's arrest on January 9, 2009. J.A. 1. The District Court's opinion reflects careful and thoughtful consideration of the law and the facts, as well as sensitivity to Amy and other victims of child pornography. Despite the Government's contrary position to the court's ultimate factual finding on proximate causation, the district court did not so clearly and indisputably abuse its discretion by determining that the Government failed to establish Amy's losses or damages that were proximately caused by Paroline's conduct of conviction.

IV. The Fifth Circuit's Decision Creates An Absurd Result.

A. The Fifth Circuit's Joint and Several Liability Rule Conflicts with §2259(b)(4)(B)(ii).

The *en banc* Fifth Circuit and Amy would make all defendants jointly and severally liable for the restitution and cutting off Amy's recovery when the full amount of the restitution had been paid. This is inconsistent with the plain language of

§2259(b)(4)(B)(ii).[21] This is a misapplication of the whole text canon of statutory interpretation.

The plain reading of §2259(b)(4)(B)(ii) shows a congressional intent that victims be allowed multiple recoveries, either from insurance companies or other sources. The plain text of the statute abrogates the provision of 18 U.S.C. §3664(h) allowing district courts to either apportion restitution among multiple defendants or making each defendant liable for the full amount of restitution. Section 2259(b)(2) – dealing with the enforcement of the restitution order – cross references §3664. Section 3664(h) implies that joint and several liability may be imposed only when a single district judge is dealing with multiple defendants in a single case (or indictment); the law does not contemplate apportionment of liability among defendants in different cases, before different judges, in different jurisdictions around the country. In fact, two circuits have observed, in unpublished opinions, that joint and several liability is not permissible under §3664(h) regarding defendants in separate cases. *See Monzel*, 641 F.3d at 539 (*citing United States v. McGlown*, 380 F. App'x 487, 490-91 (6th

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[21] Section 2259(b)(4)(B)(ii) forbids district courts to decline issuing restitution orders because of "the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance *or any other source*." (emphasis added). "Any other source" would include other restitution orders.

Cir.2010) and *United States v. Channita*, 9 F. App'x 274, 274-75 (4th Cir.2001)).

The *en banc* Fifth Circuit's joint and several liability rule also ignores the abrogation of 18 U.S.C. §3664(j) restitution adjustments for crimes subject to §2259 restitution under the plain language of §2259(b)(4)(B)(ii). Section 3664(j) requires that restitution be paid to insurance companies or others obligated to pay for some or all of the victim's losses and reduces the amount of restitution by any amount recovered as compensatory damages in a state or federal civil proceeding. However, §2259(b)(4)(B)(ii) when read in conjunction with the Fifth Circuit's interpretation of §2259(b)(3) would not allow reduction of restitution to prevent a double recovery or to make third party payers whole. It specifically contemplates and allows multiple recoveries.[22]

When applied in conjunction with the Fifth Circuit's holding on proximate cause, §2259(b)(4)(B)(ii) requires restitution for all the victim's losses from *every* defendant because restitution paid by Defendant A would not be credited to restitution ordered by Defendant B. It would be compensation "from any other source." Thus, every defendant would be liable for all losses suffered by the victim regardless of whether his acts caused those losses and regardless of

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[22] Insurance companies might have a contractual right of subrogation.

whether the victim had already received the full amount of restitution.

B. Joint and Several Liability Rule Creates a Procedural Nightmare.

The *en banc* Fifth Circuit's holdings creates an absurd result.

If §2259 were construed to allow joint and several liability with contribution from multiple defendants, the result would create a procedural nightmare for the courts. The *en banc* Fifth Circuit attempts to minimize the burden on the courts and the Government by stating that the Government and probation departments have access to payment information and can easily determine if full restitution has been paid. 701 F.3d at 771 n.17. This specific conclusion is not supported by the record in this cause. Specifically, the Administrative Office of the United States Courts informed the District Court that it would be "highly impractical if not impossible for a clerk to track debt payments in multiple jurisdictions over an extended period of time. . . . Clerks would be unaware of . . . subsequent convictions that result in new joint and several orders." J.A. 131.

However, this ignores other factors including obtaining a restitution order in the cases in which Amy chooses not to participate. J.A. 230. Under the Fifth Circuit's joint and several liability theory, the burden on any single defendant such as Petitioner is limited by making other defendants jointly and

severally liable for the total restitution award. The Circuit failed to consider how this "protection" would work.

Assessing restitution among co-defendants – even different amounts assessed against different defendants – is both relatively easy and constitutional when the criminal activity involves a single scheme before a single district court. *See, e.g., United States v. Vineyard,* 699 F.Supp. 103 (E.D. Tex. 1998), *affirmed,* 860 F.2d 435 (5th Cir.1988) (Table), *cert. denied sub nom. Ryan v. United States,* 489 U.S. 1019 (1989). However, the type of joint and several liability in *Vineyard* is unlike the joint and several liability contemplated by the *en banc* Fifth Circuit in the instant case. *Vineyard* involved a discrete group of defendants involved in a related scheme tried before a single district court. The harm caused by each defendant is subject to reasonable determination.

In cases in which Amy chooses not to seek a restitution order, would the Government or defendants such as Paroline have the right to intervene in order to ensure that defendant was ordered to pay restitution? How are Paroline and others similarly situated to learn of those other cases? If the Government fails for whatever reason to seek a restitution order in a specific case, would Paroline and others under a joint and several restitution order have the right to mandamus the United States Attorney or the Attorney General to require the Government to seek a restitution order or contribution from that defendant? Would defendants subject to a restitution order

be able to file civil actions against others for contribution, including those in which Amy chose not to seek restitution?

C. Registered Sex Offenders Cannot and Should Not Be Given the Opportunity to Relive Their Crimes Under the Auspices of Pursuing "Joint and Several" Liability.

The Fifth Circuit's rationale would create an impossibility of enforcement based on often imposed prohibitions by district court that registered sex offenders not have contact with each other. *Gamble*, 709 F.3d at 553. In order to bring some semblance of order out of the chaos inherent in the *en banc* Circuit's decision, it would be necessary to create some sort of nationwide system or court having jurisdiction over all restitution orders and possibly claims for contribution against defendants in cases where neither Amy nor the Government sought restitution. The alternative would be to allow some defendants to escape any restitution obligation while others shoulder the full burden. This would be contrary to the Fifth Circuit's intent in imposing joint and several liability with the restitution to end when Amy received the entire amount of restitution.

The Court decided a similar but simpler method of assessing payments among various defendants.

The case, *McDermott, Inc. v. Amclyde,* 511 U.S. 202 (1994), involved admiralty litigation. The Court was faced with allocating payments in tort among settling and non-settling tortfeasors. It looked at three possible methods of allocation in RESTATEMENT (SECOND) OF TORTS §886A (1977) and held the fairest and most efficient manner of allocation was to require the non-settling tortfeasor to pay based on its proportionate share of the fault decided by the finder of fact. 511 U.S. at 217. This Court also considered the possibility that the approach could overcompensate the victim but was willing to accept that possibility. It wrote, "Several doctrines, such as the collateral benefits rule, recognize that making tortfeasors pay for the damages they cause can be more important than preventing overcompensation." *Id.* at 219.

Applying a standard similar to *McDermott* would solve many of the procedural problems caused by the *en banc* Fifth Circuit's joint and several liability theory. It would require judges to determine each defendant's proportional share of the harm. It also would limit any defendant's share of the total restitution to his proportionate share based on the harm he caused.

The result would be the requirement for a nexus between the defendant's specific conduct and the degree of harm caused to the victim by his actions must be determined – that is, a finding of proximate cause.

V. The *En Banc* Fifth Circuit's Decision, Imposing Strict Liability For All Losses And Damages Of A Victim For Those Individuals Who Possess Child Pornography, Would Result In Awards Of Restitution That Would Violate The Eighth Amendment Of The United States Constitution.

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The Court has never actually applied the Excessive Fines Clause to criminal restitution. However, the Court has held that the Excessive Fines Clause "limits the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'" *Austin v. United States*, 509 U.S. 602, 609-10 (1993). *See also United States v. Bajakajian*, 524 U.S. 321, 328 (1998).

In *Bajakajian*, the Court held that the forfeiture of $357,144 that the Defendant failed to declare upon leaving the United States would violate the Excessive Fines Clause of the Eighth Amendment because full forfeiture would be grossly disproportional to the gravity of his offense. 524 U.S. at 328. The Court concluded that forfeitures can constitute a punishment for an offense. *Id.* The Court reasoned that the forfeiture of currency ordered by 18 U.S.C. §982(a)(1) was punishment because the statute orders the forfeiture of currency as an additional sanction when imposing a sentence on a person convicted of violating 18 U.S.C. §5316's reporting requirement. In

Bajakajian, the forfeiture could only be imposed at the culmination of a criminal proceeding which requires a conviction of an underlying felony, and it cannot be imposed upon an innocent owner of unreported currency, but only upon a person who has been convicted of a reporting violation. *Id.*

Likewise, for a court to order restitution pursuant to §2259, a person must be convicted of a Chapter 110 criminal sentence. Additionally, the restitution order can only be included as part of a sentence after the court considers 18 U.S.C. §3553(a) which authorizes the sentencing court to consider the need to provide "restitution to any victims of the offense." 18 U.S.C. §3553(a)(7). Furthermore, to assist the sentencing court, a presentence report is prepared incident to FED. R. CRIM. P. 32(c)(1)(B) which is required to include any requests for restitution that must be addressed by the sentencing court. Finally, the presentence report applies the instruction set out by the sentencing guidelines which incorporates §2259 in U.S.S.G. §5E1.1.

Understandably, criminal restitution orders are both rehabilitative and punishment. *Kelly*, 479 U.S. at 53. Restitution is in the interest of the state, not for compensation of the victim[23] but rather is an

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[23] *Accord, United States v. Brown*, 744 F.2d 905, 909 (2d Cir.1984), discussing the penal purpose of restitution and noting that the value of restitution is not in paying victims but as an "instrument to make the offender more conscious of his debt to the victim."

effective rehabilative penalty that forces a defendant to confront, in concrete terms, the harm his actions caused. Such a penalty affects a defendant differently than a traditional fine, paid to the Government, and often calculated without regard to the harm the defendant causes. Similarly, the direct relationship between the harm and the punishment gives restitution a more precise deterrent effect than a traditional fine. *Kelly*, 479 U.S. at 49 n.10.

In *United States v. Dubose*, 146 F.3d 1141, 1145 (9th Cir.1998), the Court stated that restitution under the MVRA is punishment because the MVRA has not only remedial, but also deterrent, rehabilitative, and retributive purposes. *See Austin*, 509 U.S. at 610 ([I]f a sanction has a remedial purpose, but it also has a retributive or deterrent purpose, the Eighth Amendment is invoked). The Ninth Circuit in discussing the MURA, recognized that:

> The legislative history of the Act makes this clear. *See, e.g.*, H. R. Rep. No. 104-16, at 5 (1995), reprinted in 1995 WL 43586 (stating [1145] that the law both "strives to provide [victims] with some means of recoupment" and "requires the offender to face the harm suffered by his victims and to others harmed by his unlawful actions."); S. Rep. No. 104-179, at 18 (1995), reprinted in 1996 U.S.C.C.A.N. 924, 931 (emphasizing "the benefits that even nominal restitution payments have for the victim of crime, as well as the potential penalogical [sic] benefits of

> requiring the offender to be accountable for the harm caused to the victim").
>
> Moreover, that restitution is tied to the culpability of the defendant "makes [it] look more like punishment." *Austin*, 509 U.S. at 619.

Dubose, 146 F.3d at 1145. *Accord, Wright v. Riveland*, 219 F.3d 905, 916 (9th Cir.2000).

However, the Court held that when a restitution order is geared directly to the amount of a victim's loss caused by a defendant's criminal conduct, proportionality is built into the restitution order. *Id.*; *see United States v. Price*, 65 F.3d 903, 908 n.7 (11th Cir.1995). Applying this rationale to Paroline, no evidence was presented by the Government or Amy that Paroline's conduct directly caused her losses or damages. When considering Amy's stipulation "that none of the damages" flow from her knowledge of Paroline or his conduct" (J.A. 230), the *en banc* Fifth Circuit has held Paroline liable for $3.4 million for someone else's criminal conduct that caused Amy's losses or damages.

For Excessive Fine consideration, the Court has held some penalties such as civil fines, taxes on drugs and forfeitures can constitute "punishment" even though not denominated as criminal punishment when the amount is "grossly disproportionate" to the defendant's conduct or the circumstances are clearly punitive. In *United States v. Halper*, 490 U.S. 435 (1989), the Court held civil penalties for Medicare

fraud constituted punishment when the penalties bore no relationship to the costs to the Government. The *Halper* Court found that civil penalties 220 times the measurable loss to the Government were grossly disproportionate and constituted punishment for purposes of the Double Jeopardy Clause. Likewise, in *Department of Revenue v. Kurth Ranch*, 511 U.S. 767 (1994), the Court found that a "tax" on marijuana eight times the value of the drug was so disproportionate that it constituted punishment rather than a tax. And, in *Austin*, the Court held forfeitures serve both a punitive and remedial process and are subject to an Excessive Fines Clause analysis.

Halper, Kurth Ranch, Austin and *Bajakajian* require a proportionality analysis between the penalty or sanction assessed and the harm caused by the criminal conduct. It is irrelevant whether the penalty is called a civil fine, a tax, or a forfeiture, the result is the same. To be constitutional under the Excessive Fines Clause,[24] there must be a reasonable relationship between the crime of conviction and the losses or damages a defendant's conduct caused. The same constitutional requirement should apply to any mandatory restitution that requires the assessment of a $3.4 million restitution order without regard to the harm caused by a defendant's criminal acts.

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[24] Since restitution is part of the criminal trial proceeding, the Double Jeopardy Clause is not directly implicated.

More specifically, in contrast to drug taxes, fines or forfeitures, a request for restitution under §2259 depends not on the Government but rather a private citizen who is not a party to the prosecution. And, like in this case, a victim has discretionary power to hand select the defendant against whom restitution will be sought, the venue in which the matter will be litigated and, ultimately, the dollar amount of restitution ordered.[25] The Government's role is to simply present the evidence submitted by a private party and process any payments.

Contrary to the Court's jurisprudence, long-standing common law principles and Congressional intent in crafting criminal restitution statutes, the *en banc* Fifth Circuit held that the purpose of restitution is remedial, not punitive. So that restitution is not a punishment for Eighth Amendment purposes because it is not punitive. The court held restitution simply seeks to restore the victim instead of punishing the defendant. The *en banc* Fifth Circuit wrote off Paroline's and the Government's Eighth Amendment concerns that restitution award for $3.4 million would violate the Excessive Fines Clause unless a victim's losses or damages were proximately caused

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[25] Of all the defendants convicted of offenses involving images of Amy, Amy has withdrawn her requests for restitution in 80% of the cases. In essence, Amy has commanded the Government's selective prosecution of otherwise similarly situated defendants in violation of the Equal Protection Clause of the Fifth Amendment.

by a defendant's offense conduct. 701 F.2d at 771-72. The *en banc* Fifth Circuit suggested that assessing restitution without a showing of proximate cause between the defendant's crime and the victim's loss "may appear harsh, it is not grossly disproportionate to the crime of receiving and possessing child pornography." *Id.* at 772.

Both of the *en banc* Fifth Circuit's holdings are incorrect.

The *en banc* Fifth Circuit's construction of §2259(b)(1)(A-E) breaks the connection between the defendant's crime and the losses or damages caused by the defendant's criminal acts. It would hold Paroline and all others who possessed images of Amy liable for $3.4 million in restitution without consideration of how their crime related to Amy's losses. The *en banc* Fifth Circuit's position that while assessment of restitution without a showing of a nexus "may appear harsh" and not "grossly disproportionate to the crime of receiving and possessing child pornography," 701 F.3d at 772, directly conflicts with *Halper* and *Bajakajian*. For Eighth Amendment consideration, the Court has judged the constitutionality of the civil fines and forfeiture based on the harm the criminal acts cause in relation to an individual's conduct. The same rationale must be applied to restitution which is punitive.

Restitution awards such as those sought by Amy and approved by the *en banc* Fifth Circuit are punitive for another reason: They impose a restitution

obligation on defendants for harm caused before their criminal acts. As a logical matter, a defendant cannot cause harm prior to the date of his offense. *United States v. Fast*, 709 F.3d 712, 722 (8th Cir.2013), *citing Kearney*, 672 F.3d at 97.

As the Government has noted throughout these proceedings the imposition of multimillion dollar restitution awards in the absence of a showing of proximate cause raises significant Eighth Amendment concerns. Section 2259 must be interpreted to avoid "'grave and doubtful constitutional questions.'" *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) (*citing United States ex rel. Attorney Gen. v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909)). In *Immigration and Naturalization Service v. St. Cyr*, 533 U.S. 289, 299-300 (2001), the Court relied upon the canon of statutory construction that if an otherwise acceptable statutory interpretation would raise serious constitutional problems and an alternative interpretation is fairly possible, "we are obligated to construe the statute to avoid such problems." *See also United States v. Booker*, 543 U.S. 220, 286 (2005) ("where a statute is susceptible of two constructions, one of which grave and doubtful constitutional questions arise and the other of which such questions are avoided, our duty is to adopt the latter."). Thus, §2259 must be interpreted to require that the Government prove that a victim's losses as enumerated in §2259(b)(3)(A-F) must be proximately caused by a defendant's conduct of conviction.

An award of $3.4 million against an individual for possessing two images of child pornography is punitive and grossly disproportionate to the offense conduct. Especially when considering the fact that Amy stipulated that she could not attribute any of her losses or damages directly to Paroline's conduct. J.A. 230. Thus, based on the evidence presented in this case, it was the opinion of the District Court that the Eighth Amendment is violated when a restitution order is not limited to losses proximately caused by the defendant's conduct. *Paroline*, 672 F.Supp. at 789.

The Court should follow *Halper*, *Austin*, *Kurth Ranch*, and *Bajakajian* and construe §2259 in a manner that is consistent with the prohibition against Excessive Fines. The Court can only do so by requiring that proximate cause exists between a defendant's possession of child pornography and the losses or damages sustained by a victim in setting the amount of restitution. Any other result would undermine the legislative scheme embraced by §2259 and would require that a defendant pay restitution for losses or damages caused by the criminal conduct of others.

CONCLUSION

For all of the foregoing reasons, the decision of the Fifth Circuit granting mandamus should be reversed and the opinion of the District Court should be upheld.

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Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

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18 U.S.C. § 1593. Mandatory restitution

(a) Notwithstanding section 3663 or 3663A, and in addition to any other civil or criminal penalties authorized by law, the court shall order restitution for any offense under this chapter.

(b)(1) The order of restitution under this section shall direct the defendant to pay the victim (through the appropriate court mechanism) the full amount of the victim's losses, as determined by the court under paragraph (3) of this subsection.

(2) An order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A.

(3) As used in this subsection, the term "full amount of the victim's losses" has the same meaning as provided in section 2259(b)(3) and shall in addition include the greater of the gross income or value to the defendant of the victim's services or labor or the value of the victim's labor as guaranteed under the minimum wage and overtime guarantees of the Fair Labor Standards Act (29 U.S.C. 201 et seq.).

(4) The forfeiture of property under this subsection shall be governed by the provisions of section 413 (other than subsection (d) of such section) of the Controlled Substances Act (21 U.S.C. 853).

(c) As used in this section, the term "victim" means the individual harmed as a result of a crime under this chapter, including, in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or a representative of the victim's estate, or another family member, or any other person appointed as suitable by the court, but in no event shall the defendant be named such representative or guardian.

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18 U.S.C. § 2248. Mandatory restitution

(a) In General. – Notwithstanding section 3663 or 3663A, and in addition to any other civil or criminal penalty authorized by law, the court shall order restitution for any offense under this chapter.

(b) Scope and Nature of Order. –

(1) Directions. – The order of restitution under this section shall direct the defendant to pay to the victim (through the appropriate court mechanism) the full amount of the victim's losses as determined by the court pursuant to paragraph (2).

(2) Enforcement. – An order of restitution under this section shall be issued and enforced in

accordance with section 3664 in the same manner as an order under section 3663A.

(3) **Definition.** – For purposes of this subsection, the term "full amount of the victim's losses" includes any costs incurred by the victim for –

(A) medical services relating to physical, psychiatric, or psychological care;

(B) physical and occupational therapy or rehabilitation;

(C) necessary transportation, temporary housing, and child care expenses;

(D) lost income;

(E) attorneys' fees, plus any costs incurred in obtaining a civil protection order; and

(F) any other losses suffered by the victim as a proximate result of the offense.

(4) **Order mandatory.** –

(A) The issuance of a restitution order under this section is mandatory.

(B) A court may not decline to issue an order under this section because of –

(i) the economic circumstances of the defendant; or

(ii) the fact that a victim has, or is entitled to, receive compensation for his

or her injuries from the proceeds of insurance or any other source.

(c) **Definition.** – For purposes of this section, the term "victim" means the individual harmed as a result of a commission of a crime under this chapter, including, in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, but in no event shall the defendant be named as such representative or guardian.

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18 U.S.C. § 2264. Restitution

(a) **In General.** – Notwithstanding section 3663 or 3663A, and in addition to any other civil or criminal penalty authorized by law, the court shall order restitution for any offense under this chapter.

(b) **Scope and Nature of Order.** –

(1) **Directions.** – The order of restitution under this section shall direct the defendant to pay the victim (through the appropriate court mechanism) the full amount of the victim's losses as determined by the court pursuant to paragraph (2).

(2) **Enforcement.** – An order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A.

(3) Definition. – For purposes of this subsection, the term "full amount of the victim's losses" includes any costs incurred by the victim for –

(A) medical services relating to physical, psychiatric, or psychological care;

(B) physical and occupational therapy or rehabilitation;

(C) necessary transportation, temporary housing, and child care expenses;

(D) lost income;

(E) attorneys' fees, plus any costs incurred in obtaining a civil protection order; and

(F) any other losses suffered by the victim as a proximate result of the offense.

(4) Order mandatory. –

(A) The issuance of a restitution order under this section is mandatory.

(B) A court may not decline to issue an order under this section because of –

(i) the economic circumstances of the defendant; or

(ii) the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source.

(c) Victim Defined. – For purposes of this section, the term "victim" means the individual harmed as a result of a commission of a crime under this chapter, including, in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, but in no event shall the defendant be named as such representative or guardian.

---

18 U.S.C. § 2327. Mandatory restitution

(a) In General. – Notwithstanding section 3663 or 3663A, and in addition to any other civil or criminal penalty authorized by law, the court shall order restitution to all victims of any offense for which an enhanced penalty is provided under section 2326.

(b) Scope and Nature of Order. –

(1) Directions. – The order of restitution under this section shall direct the defendant to pay to the victim (through the appropriate court mechanism) the full amount of the victim's losses as determined by the court pursuant to paragraph (2).

(2) Enforcement. – An order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A.

(3) Definition. – For purposes of this subsection, the term "full amount of the victim's losses" means all losses suffered by the victim as a proximate result of the offense.

(4) Order mandatory. –

(A) The issuance of a restitution order under this section is mandatory.

(B) A court may not decline to issue an order under this section because of –

(i) the economic circumstances of the defendant; or

(ii) the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source.

(c) Victim Defined. – In this section, the term "victim" has the meaning given that term in section 3663A(a)(2).

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18 U.S.C. § 3553. Imposition of a sentence

(a) Factors To Be Considered in Imposing a Sentence. – The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed –

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for –

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines –

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement –

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

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18 U.S.C. § 3663. Order of restitution

(a)(1)(A) The court, when sentencing a defendant convicted of an offense under this title, section 401, 408(a), 409, 416, 420, or 422(a) of the Controlled Substances Act (21 U.S.C. 841, 848(a), 849, 856, 861, 863) (but in no case shall a participant in an offense under such sections be considered a victim of such offense under this section), or section 5124, 46312, 46502, or 46504 of title 49, other than an offense described in section 3663A(c), may order, in addition to or, in the case of a misdemeanor, in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense, or if the victim is deceased, to the victim's estate. The court may also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

(B)(i) The court, in determining whether to order restitution under this section, shall consider –

(I) the amount of the loss sustained by each victim as a result of the offense; and

(II) the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.

(ii) To the extent that the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution under this section outweighs the need to provide restitution to any victims, the court may decline to make such an order.

(2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

(3) The court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement.

(b) The order may require that such defendant –

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense –

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impractical, or inadequate, pay an amount equal to the greater of –

(i) the value of the property on the date of the damage, loss, or destruction, or

(ii) the value of the property on the date of sentencing, less the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim including an offense under chapter 109A or chapter 110 –

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury also results in the death of a victim, pay an amount equal to the cost of necessary funeral and related services;

(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses related to participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense;

(5) in any case, if the victim (or if the victim is deceased, the victim's estate) consents, make restitution in services in lieu of money, or make restitution to a person or organization designated by the victim or the estate; and

(6) in the case of an offense under sections 1028(a)(7) or 1028A(a) of this title, pay an amount equal to the value of the time reasonably spent by the victim in an attempt to remediate the intended or actual harm incurred by the victim from the offense.

(c)(1) Notwithstanding any other provision of law (but subject to the provisions of subsections (a)(1)(B)(i)(II) and (ii), when sentencing a defendant convicted of an offense described in section 401, 408(a), 409, 416, 420, or 422(a) of the Controlled Substances Act (21 U.S.C. 841, 848(a), 849, 856, 861, 863), in which there is no identifiable victim, the court may order that the defendant make restitution in accordance with this subsection.

(2)(A) An order of restitution under this subsection shall be based on the amount of public harm caused by the offense, as determined by the court in accordance with guidelines promulgated by the United States Sentencing Commission.

(B) In no case shall the amount of restitution ordered under this subsection exceed the amount of the fine which may be ordered for the offense charged in the case.

(3) Restitution under this subsection shall be distributed as follows:

(A) 65 percent of the total amount of restitution shall be paid to the State entity designated to administer crime victim assistance in the State in which the crime occurred.

(B) 35 percent of the total amount of restitution shall be paid to the State entity designated to receive Federal substance abuse block grant funds.

(4) The court shall not make an award under this subsection if it appears likely that such award would interfere with a forfeiture under chapter 46 or chapter 96 of this title or under the Controlled Substances Act (21 U.S.C. 801 et seq.).

(5) Notwithstanding section 3612(c) or any other provision of law, a penalty assessment under section 3013 or a fine under subchapter C of chapter 227 shall take precedence over an order of restitution under this subsection.

(6) Requests for community restitution under this subsection may be considered in all plea agreements negotiated by the United States.

(7)(A) The United States Sentencing Commission shall promulgate guidelines to assist courts in determining the amount of restitution that may be ordered under this subsection.

(B) No restitution shall be ordered under this subsection until such time as the Sentencing Commission promulgates guidelines pursuant to this paragraph.

(d) An order of restitution made pursuant to this section shall be issued and enforced in accordance with section 3664.

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18 U.S.C. § 3663A. Mandatory restitution to victims of certain crimes

(a)(1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

(2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for

which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

(3) The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

(b) The order of restitution shall require that such defendant –

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense –

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to –

(i) the greater of –

(I) the value of the property on the date of the damage, loss, or destruction; or

(II) the value of the property on the date of sentencing, less

(ii) the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim –

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury that results in the death of the victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.

(c)(1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense –

(A) that is –

(i) a crime of violence, as defined in section 16;

(ii) an offense against property under this title, or under section 416(a) of the Controlled Substances Act (21 U.S.C. 856(a)), including any offense committed by fraud or deceit;

(iii) an offense described in section 1365 (relating to tampering with consumer products); or

(iv) an offense under section 670 (relating to theft of medical products); and

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

(2) In the case of a plea agreement that does not result in a conviction for an offense described in paragraph (1), this section shall apply only if the plea specifically states that an offense listed under such paragraph gave rise to the plea agreement.

(3) This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) if the court finds, from facts on the record, that –

(A) the number of identifiable victims is so large as to make restitution impracticable; or

(B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

(d) An order of restitution under this section shall be issued and enforced in accordance with section 3664.

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18 U.S.C. § 3664. Procedure for issuance and enforcement of order of restitution

(a) For orders of restitution under this title, the court shall order the probation officer to obtain and include in its presentence report, or in a separate report, as the court may direct, information sufficient for the court to exercise its discretion in fashioning a restitution order. The report shall include, to the extent practicable, a complete accounting of the losses to each victim, any restitution owed pursuant to a plea agreement, and information relating to the economic circumstances of each defendant. If the number or identity of victims cannot be reasonably ascertained, or other circumstances exist that make this

requirement clearly impracticable, the probation officer shall so inform the court.

(b) The court shall disclose to both the defendant and the attorney for the Government all portions of the presentence or other report pertaining to the matters described in subsection (a) of this section.

(c) The provisions of this chapter, chapter 227, and Rule 32(c) of the Federal Rules of Criminal Procedure shall be the only rules applicable to proceedings under this section.

(d)(1) Upon the request of the probation officer, but not later than 60 days prior to the date initially set for sentencing, the attorney for the Government, after consulting, to the extent practicable, with all identified victims, shall promptly provide the probation officer with a listing of the amounts subject to restitution.

(2) The probation officer shall, prior to submitting the presentence report under subsection (a), to the extent practicable –

(A) provide notice to all identified victims of –

(i) the offense or offenses of which the defendant was convicted;

(ii) the amounts subject to restitution submitted to the probation officer;

(iii) the opportunity of the victim to submit information to the probation officer concerning the amount of the victim's losses;

(iv) the scheduled date, time, and place of the sentencing hearing;

(v) the availability of a lien in favor of the victim pursuant to subsection (m)(1)(B); and

(vi) the opportunity of the victim to file with the probation officer a separate affidavit relating to the amount of the victim's losses subject to restitution; and

(B) provide the victim with an affidavit form to submit pursuant to subparagraph (A)(vi).

(3) Each defendant shall prepare and file with the probation officer an affidavit fully describing the financial resources of the defendant, including a complete listing of all assets owned or controlled by the defendant as of the date on which the defendant was arrested, the financial needs and earning ability of the defendant and the defendant's dependents, and such other information that the court requires relating to such other factors as the court deems appropriate.

(4) After reviewing the report of the probation officer, the court may require additional documentation or hear testimony. The privacy of any records filed, or testimony heard, pursuant to this section shall be maintained to the greatest extent possible,

and such records may be filed or testimony heard in camera.

(5) If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.

(6) The court may refer any issue arising in connection with a proposed order of restitution to a magistrate judge or special master for proposed findings of fact and recommendations as to disposition, subject to a de novo determination of the issue by the court.

(e) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant's dependents, shall be on the defendant. The burden of demonstrating such other

matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

(f)(1)(A) In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant.

(B) In no case shall the fact that a victim has received or is entitled to receive compensation with respect to a loss from insurance or any other source be considered in determining the amount of restitution.

(2) Upon determination of the amount of restitution owed to each victim, the court shall, pursuant to section 3572, specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid, in consideration of –

(A) the financial resources and other assets of the defendant, including whether any of these assets are jointly controlled;

(B) projected earnings and other income of the defendant; and

(C) any financial obligations of the defendant; including obligations to dependents.

(3)(A) A restitution order may direct the defendant to make a single, lump-sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments.

(B) A restitution order may direct the defendant to make nominal periodic payments if the court finds from facts on the record that the economic circumstances of the defendant do not allow the payment of any amount of a restitution order, and do not allow for the payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments.

(4) An in-kind payment described in paragraph (3) may be in the form of –

(A) return of property;

(B) replacement of property; or

(C) if the victim agrees, services rendered to the victim or a person or organization other than the victim.

(g)(1) No victim shall be required to participate in any phase of a restitution order.

(2) A victim may at any time assign the victim's interest in restitution payments to the Crime Victims Fund in the Treasury without in any way impairing the obligation of the defendant to make such payments.

(h) If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant.

(i) If the court finds that more than 1 victim has sustained a loss requiring restitution by a defendant, the court may provide for a different payment schedule for each victim based on the type and amount of each victim's loss and accounting for the economic circumstances of each victim. In any case in which the United States is a victim, the court shall ensure that all other victims receive full restitution before the United States receives any restitution.

(j)(1) If a victim has received compensation from insurance or any other source with respect to a loss, the court shall order that restitution be paid to the person who provided or is obligated to provide the compensation, but the restitution order shall provide that all restitution of victims required by the order be paid to the victims before any restitution is paid to such a provider of compensation.

(2) Any amount paid to a victim under an order of restitution shall be reduced by any amount later recovered as compensatory damages for the same loss by the victim in –

(A) any Federal civil proceeding; and

(B) any State civil proceeding, to the extent provided by the law of the State.

(k) A restitution order shall provide that the defendant shall notify the court and the Attorney General of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution. The court may also

accept notification of a material change in the defendant's economic circumstances from the United States or from the victim. The Attorney General shall certify to the court that the victim or victims owed restitution by the defendant have been notified of the change in circumstances. Upon receipt of the notification, the court may, on its own motion, or the motion of any party, including the victim, adjust the payment schedule, or require immediate payment in full, as the interests of justice require.

(l) A conviction of a defendant for an offense involving the act giving rise to an order of restitution shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim.

(m)(1)(A)(i) An order of restitution may be enforced by the United States in the manner provided for in subchapter C of chapter 227 and subchapter B of chapter 229 of this title; or

(ii) by all other available and reasonable means.

(B) At the request of a victim named in a restitution order, the clerk of the court shall issue an abstract of judgment certifying that a judgment has been entered in favor of such victim in the amount specified in the restitution order. Upon registering, recording, docketing, or indexing such abstract in accordance with the rules and requirements relating to judgments of the court of the State where the district court is located, the abstract of judgment shall be a

lien on the property of the defendant located in such State in the same manner and to the same extent and under the same conditions as a judgment of a court of general jurisdiction in that State.

(2) An order of in-kind restitution in the form of services shall be enforced by the probation officer.

(n) If a person obligated to provide restitution, or pay a fine, receives substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still owed.

(o) A sentence that imposes an order of restitution is a final judgment notwithstanding the fact that –

(1) such a sentence can subsequently be –

(A) corrected under Rule 35 of the Federal Rules of Criminal Procedure and section 3742 of chapter 235 of this title;

(B) appealed and modified under section 3742;

(C) amended under subsection (d)(5); or

(D) adjusted under section 3664(k), 3572, or 3613A; or

(2) the defendant may be resentenced under section 3565 or 3614.

(p) Nothing in this section or sections 2248, 2259, 2264, 2327, 3663, and 3663A and arising out of the application of such sections, shall be construed to create a cause of action not otherwise authorized in favor of any person against the United States or any officer or employee of the United States.

RESPONDENT'S BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
SEP 27 2013
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No. 12-8561

In the Supreme Court of the United States

DOYLE RANDALL PAROLINE, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

What, if any, causal relationship or nexus between the defendant's conduct and the victim's harm or damages must the government or the victim establish in order to recover restitution under 18 U.S.C. 2259?

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In the Supreme Court of the United States

No. 12-8561

DOYLE RANDALL PAROLINE, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The amended opinion of the en banc court of appeals (J.A. 425-499) is reported at 701 F.3d 749. The original opinion of the en banc court of appeals (J.A. 349-424) is reported at 697 F.3d 306. The panel opinions (J.A. 298-310, 325-348) are reported at 636 F.3d 190 and 591 F.3d 792. The district court opinion (J.A. 271-297) is reported at 672 F. Supp. 2d 781.

JURISDICTION

The amended judgment of the en banc court of appeals was entered on November 19, 2012. The petition for a writ of certiorari was filed on January 31, 2013, and was granted on June 27, 2013. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of Texas, petitioner was convicted of possession of child pornography, in violation of 18 U.S.C. 2252(a)(4)(B). The government sought restitution under 18 U.S.C. 2259 on behalf of the respondent victim ("Amy") who was depicted in some of the images possessed by petitioner. The district court declined to order any restitution. Amy filed a petition for a writ of mandamus under the Crime Victims' Rights Act (CVRA), Pub. L. No. 108-405, § 102(a), 118 Stat. 2262 (18 U.S.C. 3771(d)(3)), and a notice of appeal. The court of appeals initially denied the mandamus petition, but on rehearing the panel issued a writ of mandamus. On rehearing en banc, the court again granted Amy's mandamus petition and remanded for further proceedings. See J.A. 271-310, 325-499.

1. When sentencing a defendant "for any offense" under Chapter 110 of Title 18, which generally covers sexual-exploitation offenses related to child pornography, a court is to order restitution in "the full amount of the victim's losses." 18 U.S.C. 2259(a) and (b)(1); see 18 U.S.C. 2259(b)(4)(A) ("The issuance of a restitution order under this section is mandatory."). The possession of child pornography is a Chapter 110 offense. See 18 U.S.C. 2252(a)(4), 2252A(a)(5). A "victim," in turn, is defined as an "individual harmed as a result of a commission of a crime under this chapter." 18 U.S.C. 2259(c). And the "full amount of the victim's losses" is defined to include "any costs incurred by the victim for" medical services (including psychiatric and psychological care); physical and occupational therapy or rehabilitation; necessary trans-

portation, temporary housing, and child care expenses; lost income; attorneys' fees and other litigation costs; and "any other losses suffered by the victim as a proximate result of the offense." 18 U.S.C. 2259(b)(3).

Section 2259 further provides that the order of restitution "shall be issued and enforced in accordance with [18 U.S.C.] 3664." 18 U.S.C. 2259(b)(2). Section 3664(e) places on the government the "burden of demonstrating the amount of the loss sustained by a victim as a result of the offense" and provides that "[a]ny dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence." 18 U.S.C. 3664(e). Section 3664(h) provides that, "[i]f the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant." 18 U.S.C. 3664(h).

Although not a party to the criminal prosecution, a "crime victim," or the government on the victim's behalf, may seek to enforce the victim's rights by filing a motion in the district court. See 18 U.S.C. 3771(d)(1) and (3). A "crime victim" is defined as "a person directly and proximately harmed as a result of the commission" of a federal offense. 18 U.S.C. 3771(e). One of the crime victim's rights is "[t]he right to full and timely restitution as provided in law." 18 U.S.C. 3771(a)(6). If the district court "denies the relief sought, the movant" (*i.e.*, the crime victim or the government) "may petition the court of appeals for a writ of mandamus." 18 U.S.C. 3771(d)(3).

2. a. On July 11, 2008, Federal Bureau of Investigation (FBI) agents in Tyler, Texas, met with petitioner after an employee at a computer company discovered that petitioner's laptop contained numerous images of children posing nude and engaging in various sexual acts with adults and animals. Petitioner admitted that he had downloaded the images from the Internet and that he had downloaded and viewed child pornography for the last two years. A forensic analysis of petitioner's laptop uncovered 280 such images. Presentence Investigation Report (PSR) ¶¶ 9-12; J.A. 146.

On January 9, 2009, petitioner was arrested. J.A. 1. The government filed an information in the Eastern District of Texas charging petitioner with possessing images of child pornography, in violation of 18 U.S.C. 2252(a)(4)(B). PSR ¶ 1. Petitioner pleaded guilty, pursuant to a plea agreement, and the district court sentenced him to 24 months of imprisonment, to be followed by ten years of supervised release. See *id.* ¶ 2; J.A. 312-314.

b. The victim respondent, identified by the pseudonym "Amy" to protect her privacy, was depicted in two of the images possessed by petitioner. J.A. 146, 272 n.1, 273. The images were part of the "Misty" series—a widely distributed child-pornography series that depicts Amy, at the ages of eight and nine, being sexually abused and raped by her uncle. J.A. 272 & n.1, 273 n.3, 428. On April 17, 2009, the Department of Justice Victim Notification System (VNS) notified Amy's attorney of petitioner's guilty plea. J.A. 22-26; see J.A. 117-120 (notification of petitioner's sentence).[1]

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[1] VNS is a cooperative effort between the Department of Justice, the FBI, the United States Postal Inspection Service, and the

And, on May 1, 2009, Amy submitted a request for restitution in the amount of approximately $3.4 million, which included a lifetime of psychological counseling starting on January 1, 2009, lost income (also beginning on January 1, 2009), and expert witness and attorneys' fees. J.A. 27-58, 92-93, 164-165. Along with the request, Amy submitted a victim-impact statement created in 2008 (J.A. 59-66, 153), a psychological report dated November 21, 2008 (J.A. 67-87),[2] and an economic analysis dated September 15, 2008 (J.A. 88-116).

At the time of her victim-impact statement, Amy was 19 years old. J.A. 59. Amy explained that "[e]very day of [her] life [she] live[s] in constant fear that someone will see [her] pictures and recognize [her] and that [she] will be humiliated all over again." J.A. 60. She "know[s] that at any moment, anywhere, someone is looking at pictures of [her] as a little girl being abused by [her] uncle and is getting some kind of sick enjoyment from it." J.A. 61. That knowledge, Amy explained, is like "being abused over and over and over again." *Ibid.* "[K]nowing that the pictures

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Federal Bureau of Prisons. It is a computer-based system that provides information about important events in a federal criminal case to the victims of the federal crime. See Office for Victims of Crime, U.S. Dep't of Justice, *Crime Victims' Rights*, http://www.ojp.usdoj.gov/ovc/rights/notification_VNS.html (last visited Sept. 26, 2013). Child-pornography victims who have been linked to the images in a particular case will receive notifications about that case. Crime victims can choose not to receive such notifications and they can designate a third party to receive notifications on their behalf. See U.S. Dep't of Justice, *Victim Notification System*, http://www.notify.usdoj.gov (last visited Sept. 26, 2013).

[2] The psychological report was based in part on four evaluations of Amy between June 11 and November 10, 2008. J.A. 67.

of [her abuse] are still out there," she continued, makes everything "worse" and prevents her from "get[ting] over" her uncle's abuse. J.A. 63, 64. "[B]ecause the disgusting images of what he did to [her] are still out there on the Internet," she cannot "forget." J.A. 60.

According to the psychological report prepared by Dr. Joyanna Silberg, Amy began therapy in October 1998 at the age of nine. J.A. 70. That treatment ended the following year when the therapist concluded that Amy was "back to normal." *Ibid.* Despite that "optimistic assessment," Dr. Silberg noted that "Amy's functioning appeared to decline" during her teenage years. J.A. 71. "Most significantly, at the age of 17, Amy was informed through legal notifications about the widespread presence of her picture on the internet, illustrating to her that in some ways the sexual abuse of her has never really ended." *Ibid.* That knowledge, Dr. Silberg explained, "further exacerbated her symptoms" and "interfered with her ability to overcome the increasing symptoms of post traumatic stress, and impeded her ability to move on with her life." *Ibid.* Dr. Silberg reported, based on Amy's account, that "each discovery of another defendant that has traded her image re-traumatizes her again" and triggers "a resurgence of the trauma" based on "her ongoing realization that her image is being traded on the internet." J.A. 71-72, 73. Dr. Silberg explained that such re-victimization makes it difficult to treat Amy's "post-traumatic stress" because the "trauma" is never "over," the "past" is repeatedly "replayed," and the "existence of the pictures" and "knowledge of new defendants being arrested" are "constant" and "ongoing triggers." J.A.

83-84. Dr. Silberg concluded that Amy requires "weekly therapy" and may require "more intensive inpatient or rehabilitation services * * * over the course of her lifetime." J.A. 86.

c. The government submitted Amy's restitution request to the district court. J.A. 273-274. Petitioner submitted competing psychological and economic expert reports, J.A. 172-229, and the parties stipulated that Amy "does not know who" petitioner is and that none of her damages "flow from anyone telling her specifically" about petitioner or his offense conduct, J.A. 230. After extensive briefing and two hearings, the district court ultimately declined to order any restitution. See J.A. 271-297.

The district court agreed that Amy qualified as a "victim" under Section 2259 because she had been "harmed as a result of [petitioner's] possession of her images." J.A. 277-283. The court concluded, however, that the government needed to demonstrate proximate cause and that it failed to make that necessary showing. J.A. 283-296. In the court's view, the evidence submitted failed to establish "any specific losses proximately caused by [petitioner's] conduct," as distinguished from the conduct of others who had also harmed Amy. J.A. 295-296.

3. a. Amy filed both a notice of appeal and a petition for a writ of mandamus under Section 3771(d)(3) of the CVRA. See J.A. 326. A divided panel of the court of appeals denied her mandamus petition. J.A. 298-310. Applying its precedent, the court reaffirmed that "[t]he standard of review [for a CVRA mandamus petition] is the usual standard for mandamus petitions," which meant that Amy, as the petitioner, had to show that the district court committed

"clear and indisputable" error. J.A. 299 (citation omitted). Because "[c]ourts across the country have followed and applied the proximate-cause requirement in imposing restitution under Section 2259," the court concluded that "it is neither clear nor indisputable that Amy's contentions regarding the statute are correct." J.A. 302. Judge Dennis dissented. J.A. 303-310.

b. Amy filed a petition for panel rehearing. A different panel was assigned the rehearing petition as well as Amy's pending appeal. J.A. 326. That panel granted Amy's petition for rehearing and held that the district court had in fact committed "clear and indisputable error" by "[i]ncorporating a proximate causation requirement [into Section 2259] where none exists." J.A. 347. Rather, the court explained, the only showing of causation necessary for the enumerated categories of losses is the "general causation" required for a claimant to qualify as a "victim" under Section 2259(c), *i.e.*, a showing that the claimant suffered harm "*as a result* of" the offense. J.A. 345. Applying that standard, the court concluded that Amy was a "victim" entitled to restitution. *Ibid.* Accordingly, it issued a writ of mandamus and remanded the case to the district court with instructions to calculate an appropriate restitution award. J.A. 347-348.

4. Petitioner sought rehearing en banc, which the court of appeals granted. After supplemental briefing and argument, the en banc court vacated the judgment and remanded for further proceedings. J.A. 425-499.[3]

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[3] The en banc court consolidated petitioner's case with that of another defendant, Michael Wright, for the limited purpose of argument and decision. The en banc court issued an amended opin-

a. As relevant here, the en banc court of appeals held that Section 2259 does not require a showing of proximate cause with respect to the enumerated categories of losses. J.A. 444-466. Relying primarily on the "rule of the last antecedent," the court concluded that a proximate-cause requirement exists only for the catch-all category of "other losses suffered by the victim." J.A. 451-466 (quoting 18 U.S.C. 2259(b)(3)(F)). The court acknowledged that every other circuit had held otherwise, but it found those decisions unpersuasive. J.A. 458-466.

The en banc court next addressed "how to allocate responsibility for a victim's harm to any single defendant," given that numerous defendants have possessed Amy's images. J.A. 466. The court explained that 18 U.S.C. 3664(h) permits a court to hold a defendant jointly and severally liable with other defendants which, it believed, included defendants in different cases. J.A. 467-470. Finally, the court dismissed concerns about overcompensation and the Eighth Amendment, noting (among other things) that a victim's total recovery would be capped at her losses and that district courts could "ameliorate the impact of joint and several liability on an individual defendant" through the use of a "payment schedule" corresponding to the defendant's ability to pay. J.A. 470-476.

Applying those principles, the en banc court held that the district court's refusal to award any restitu-

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ion on rehearing to alter the disposition in Wright's case. See J.A. 426 & n.2. Wright filed a separate petition for a writ of certiorari, which remains pending, see *Wright* v. *United States*, No. 12-8505 (filed Jan. 31, 2013), and he filed a brief as a respondent in support of petitioner at the merits stage of this case.

tion was "clear and indisputable" error. J.A. 478.[4] The court explained that "[b]ecause Amy is a victim, [Section] 2259 required the district court to award her restitution for the 'full amount of [her] losses' as defined under [Section] 2259(b)(3)." *Ibid.* (third pair of brackets in original). Accordingly, the court granted Amy's mandamus petition and remanded to the district court for a determination of the "full amount of [Amy's] losses." J.A. 479, 480 (brackets in original).

b. Judge Dennis concurred in part and concurred in the judgment, suggesting that the majority should have "le[ft] the decision as to how to proceed under these statutes to the district courts" in the first instance. J.A. 480-482. Judge Davis, joined by three other judges, concurred in part and dissented in part, concluding that proximate cause is required for all categories of losses, but that the required showing should focus on the aggregate harms caused by possessors of child pornography generally. J.A. 482-495. Judge Southwick filed a separate dissent. J.A. 496-499.

SUMMARY OF ARGUMENT

This Court should affirm the judgment below because, although the court of appeals adopted an incorrect causation standard and joint-and-several-liability approach, it properly remanded to the district court for an award of restitution.

A. Restitution is mandatory for all Chapter 110 offenses, including the possession of child pornography. And this Court and Congress have repeatedly recog-

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[4] The en banc court also held that crime victims do not have a right to appeal under the CVRA and, accordingly, only mandamus review is available. J.A. 433-444.

nized that possessors of child pornography cause serious and continuing harm to the children depicted in the images. Both propositions are critical to a proper interpretation of Section 2259's causation requirements, and any interpretation that would effectively render restitution unavailable for victims of child-pornography possession offenses must be rejected.

B. Section 2259 requires a showing of factual cause and of proximate cause. Factual causation can be demonstrated in different ways in different cases. The traditional "but-for" test is inappropriate here. It would absolve culpable defendants (like petitioner) and leave victims (like Amy) without restitution for losses indisputably caused by child-pornography possessors as a class. An "aggregate" causation standard should therefore govern restitution awards under Section 2259. An approach based on a defendant's contribution to a collectively caused harm effectuates Congress's clear intent that defendants convicted of child-pornography possession offenses pay restitution to child victims.

Section 2259 also requires a showing of proximate cause for all categories of a victim's losses. That additional limitation, however, will have little work to do in a restitution request of the sort at issue here. The link between the possession of child pornography and the typical losses (*e.g.*, therapy costs) incurred by a child whose sexual abuse is depicted in the images is proximate by any definition.

C. The case-specific arguments raised by petitioner are without merit. First, petitioner contends that a defendant cannot cause harm that occurred before the date of his offense. No such timing issue exists here.

Petitioner's possession of Amy's images predated her expert reports and all of the losses for which she seeks recovery were incurred after his offense conduct. In any event, the expert reports estimate future loss based on an ongoing (not a past) harm, and a district court could reasonably infer that the harm persisted after the defendant's offense or arrest. Second, petitioner contends that he could not have caused Amy harm because she had no knowledge of his particular conduct. That misunderstands the nature of Amy's injury, which results from the widespread circulation of images on the Internet to persons like petitioner.

D. Once the government establishes that a defendant has caused some of a victim's losses, the district court must still determine how much to award in restitution. Three answers are possible: (1) nothing (as found by the district court), (2) all of the victim's aggregate losses, jointly and severally (as held by the court of appeals), or (3) somewhere between all or nothing, through allocation by the district court (as held by every other circuit to consider the issue). The first two approaches are fatally flawed. A restitution award of zero cannot be squared with congressional intent. At the other extreme, imposing joint and several liability for all of the victim's aggregate losses has no statutory support, is practically unworkable, and may be fundamentally unfair. The third approach (allocation) is a pragmatic solution that fully effectuates the statutory purpose. A district court should have discretion to allocate a victim's losses in a reasonable manner.

ARGUMENT

The text of 18 U.S.C. 2259 makes clear that a defendant's child-pornography possession offense must have a causal relationship to the victim's harm and losses in order to support restitution. Section 2259(c) defines a "victim" as an "individual harmed *as a result of* a commission of a crime under [Chapter 110]." 18 U.S.C. 2259(c) (emphasis added). Section 2259(b)(3) defines the "full amount of the *victim's* losses" to include several enumerated categories, such as medical services related to psychological care and lost income, as well as "any other losses suffered by the victim as a *proximate result* of the offense." 18 U.S.C. 2259(b)(3) (emphases added). And Section 3664(e) provides that the government bears the "burden of demonstrating the amount of loss sustained by a victim *as a result of* the offense." 18 U.S.C. 3664(e) (emphasis added); see 18 U.S.C. 2259(b)(2) ("An order of restitution under this section shall be issued and enforced in accordance with section 3664."). Individually and collectively, that language requires a causal connection between the defendant's offense, on the one hand, and the victim's harm and losses, on the other. See *Pacific Operators Offshore, LLP* v. *Valladolid*, 132 S. Ct. 680, 690 (2012) (*Pacific Operators*) ("as the result of" language "plainly suggests causation"); *Brown* v. *Gardner*, 513 U.S. 115, 119 (1994) ("as a result of" language "is naturally read * * * to impose the requirement of a causal connection").

Every court of appeals, including the Fifth Circuit, agrees that Section 2259 includes a causation requirement of some sort. See *United States* v. *Kearney*, 672 F.3d 81, 95-96 (1st Cir. 2012), cert. dismissed, 133 S. Ct. 1521 (2013); *United States* v.

Lundquist, No. 11-5379, 2013 WL 4779644, at *5 (2d Cir. Sept. 9, 2013); *United States* v. *Crandon*, 173 F.3d 122, 125-126 (3d Cir.), cert. denied, 528 U.S. 855 (1999); *United States* v. *Burgess*, 684 F.3d 445, 456-458 (4th Cir.), cert. denied, 133 S. Ct. 490 (2012); J.A. 474 (5th Cir.); *United States* v. *Gamble*, 709 F.3d 541, 546-549 (6th Cir. 2013); *United States* v. *Laraneta*, 700 F.3d 983, 989-990 (7th Cir. 2012), petition for cert. pending, No. 13-5132 (filed June 1, 2013); *United States* v. *Fast*, 709 F.3d 712, 720-722 (8th Cir. 2013), petition for cert. pending, No. 13-69 (filed July 10, 2013); *United States* v. *Kennedy*, 643 F.3d 1251, 1260-1261 (9th Cir. 2011); *United States* v. *Benoit*, 713 F.3d 1, 18-21 (10th Cir. 2013); *United States* v. *McDaniel*, 631 F.3d 1204, 1208-1209 (11th Cir. 2011); *United States* v. *Monzel*, 641 F.3d 528, 535-537 (D.C. Cir.), cert. denied, 132 S. Ct. 756 (2011). Amy likewise concedes that restitution under Section 2259 requires some causal connection. See J.A. 244 ("[I]t would be folly for me to argue that we did not have to show harm caused by the commission of this crime."); J.A. 252 ("We need to show causation.").

The disagreement between the parties (and the courts) is over what causal relationship must exist; what constitutes sufficient evidence to prove the requisite connection; and how a court should calculate an appropriate restitution award. In petitioner's view, Amy (and victims like her) cannot establish the necessary causal connection absent evidence specifically linking the defendant's offense to particular losses incurred by the victim as a result of learning about the defendant's conduct. In Amy's view, defendants (like petitioner) should be jointly and severally liable for all of a victim's aggregate losses which, in this case, ex-

ceed $3 million. In the government's view, the answer lies in between. Amy (and victims like her) can establish the necessary causal connection based on an "aggregate" causation theory without showing a specific link to particular losses caused by an individual defendant's conduct. Once such a showing is made, district courts should allocate financial responsibility among the collective pool of similarly situated defendants, exercising discretion to impose a reasonable restitution award.

A. Section 2259's Causation Requirements Must Be Interpreted In Light Of Two Critical Principles

Section 2259 requires courts to order defendants to pay restitution to "victim[s]" of Chapter 110 offenses, such as the possession of child pornography, in the "full amount of the victim's losses." 18 U.S.C. 2259. Two (seemingly undisputed) propositions are critical to a proper interpretation of Section 2259.

First, restitution is mandatory for child-pornography possession offenses. See 18 U.S.C. 2259(a) and (b)(4)(A). Congress did not limit restitution to the production of child pornography or its distribution, and it did not exempt possession, receipt, or transportation offenses. See *Kearney*, 672 F.3d at 97. Section 2259(a) provides that a district court "shall" order restitution for "*any* offense" under Chapter 110, 18 U.S.C. 2259(a) (emphasis added), and possession of child pornography is a Chapter 110 offense, see 18 U.S.C. 2252(a)(4), 2252A(a)(5).[5]

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[5] Other Chapter 110 offenses include receipt, transportation, and distribution of child pornography, as well as other offenses involving the sexual exploitation of children. See 18 U.S.C. 2251 *et seq.*

That restitution is mandatory for child-pornography possession offenses does not mean that a court may ignore other statutory prerequisites to restitution—including causation. The causation requirements, however, must be interpreted in light of Congress's specific inclusion of child-pornography possession as one offense for which restitution is mandatory. Any interpretation that would effectively render restitution unavailable for victims of child-pornography possession offenses (or any other category of offenses set forth in Chapter 110) must therefore be rejected. See *Kearney*, 672 F.3d at 97 ("[A]ny construction" of a causation requirement "that would functionally preclude any award of restitution" for possession offenses cannot withstand scrutiny.); see Pet. Br. 48 (acknowledging that "[i]nterpretation and application" of Section 2259's causation standards "must be consistent with" Congress's purpose "of ensuring full compensation of losses for the victims of child pornography * * * possession"); cf. *Dolan* v. *United States*, 130 S. Ct. 2533, 2539 (2010) (interpreting 90-day time limit in 18 U.S.C. 3664(d)(5) in light of Congress's intent to "assure that victims of a crime receive full restitution").

Second, the possession of child pornography is not a victimless crime. Both this Court and Congress have repeatedly recognized that the "possession of child pornography * * * is harmful to the physiological, emotional, and mental health of the children depicted in child pornography." Adam Walsh Child Protection and Safety Act of 2006 (Adam Walsh Act), Pub. L. No. 109-248, § 501(1)(A), 120 Stat. 623. "[T]he materials produced are a permanent record of the children's participation and the harm to the child

is exacerbated by their circulation." *New York* v. *Ferber*, 458 U.S. 747, 759 (1982); see *id.* at 759 n.10 ("Because the child's actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place.") (citation omitted); Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110-358, § 102(3), 122 Stat. 4001 ("Child pornography is a permanent record of a child's abuse and the distribution of child pornography images revictimizes the child each time the image is viewed."); Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121(1) and (2), 110 Stat. 3009-26 ("[C]hild pornography permanently records the victim's abuse, and its continued existence causes the child victims of sexual abuse continuing harm by haunting those children in future years."); see also *United States* v. *Williams*, 553 U.S. 285, 303 (2008); *Osborne* v. *Ohio*, 495 U.S. 103, 111 (1990). "Every instance of viewing images of child pornography represents a renewed violation of the privacy of the victims and a repetition of their abuse." Adam Walsh Act § 501(2)(D), 120 Stat. 624; see *Ashcroft* v. *Free Speech Coal.*, 535 U.S. 234, 249 (2002) ("Like a defamatory statement, each new publication of the speech would cause new injury to the child's reputation and emotional well-being."). Accordingly, possessors of child pornography unquestionably cause serious and continuing harm to the children depicted in the images they possess.

B. The Victim's Harm And Losses Must Factually And Proximately Result From The Defendant's Offense When Considered In The Aggregate

With the exception of the Fifth Circuit, every court of appeals has held that Section 2259 contains a "prox-

imate cause" requirement for all categories of a victim's losses.[6] As courts have used that phrase, however, it tends to obscure the analysis because it embodies two distinct concepts: factual causation (or cause in fact) and proximate (or legal) causation.[7] The crux of the issue here is "how to assess causation where a large number of individuals each contributed in some degree to an overall harm." *Kearney*, 672 F.3d at 100 n.16. And the answer to that question is found in the doctrines of factual causation, not proximate cause (which generally limits liability once cause in fact is shown). See *id.* at 98. Factual causation doctrines provide ample support for an "aggregate" causation theory, which best effectuates congressional intent

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[6] See *Kearney*, 672 F.3d at 95-96 (1st Cir.); *Lundquist*, 2013 WL 4779644, at *5 (2d Cir.); *Crandon*, 173 F.3d at 125-126 (3d Cir.); *Burgess*, 684 F.3d at 456-458 (4th Cir.); *Gamble*, 709 F.3d at 546-549 (6th Cir.); *Laraneta*, 700 F.3d at 989-990 (7th Cir.); *Fast*, 709 F.3d at 720-722 (8th Cir.); *Kennedy*, 643 F.3d at 1260-1261 (9th Cir.); *Benoit*, 713 F.3d at 18-21 (10th Cir.); *McDaniel*, 631 F.3d at 1208-1209 (11th Cir.); *Monzel*, 641 F.3d at 535-537 (D.C. Cir.).

[7] Although "proximate cause" has at times been used as an umbrella term to encompass both cause in fact and legal cause, clarity is enhanced by decoupling the two distinct concepts. See 1 Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 26, Reporters' Note cmt. a (2005) (Third Restatement). Relatedly, the term "proximate cause" has been described as "notoriously confusing." *CSX Transp., Inc.* v. *McBride*, 131 S. Ct. 2630, 2642 (2011). While other terms, such as "legal cause," "responsible cause," or "scope of liability," may therefore be more fitting, this brief generally employs the familiar (if imprecise) "proximate cause" terminology to convey the same concept. See W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 42, p. 273 (5th ed. 1984); Third Restatement, ch. 6, Special Note on Proximate Cause.

and can readily be satisfied in child-pornography possession cases.

Section 2259 also requires a showing of proximate cause. That additional limitation on liability simply implements the well-accepted, common-sense notion that some putative victims and some injuries are too far removed from the wrongful act to warrant compensation. Proximate cause, however, will have little work to do in a restitution request of the sort at issue here (*i.e.*, a child victim seeking to recover enumerated losses resulting, at least in part, from the defendant's possession of images depicting her sexual abuse).

1. The defendant's offense must be a cause in fact of the victim's harm and losses under an aggregate-causation theory

Any "legal test" for causation "includes a requirement that the wrongful conduct must be a *cause in fact* of the harm." 2 Fowler V. Harper & Fleming James, Jr., *The Law of Torts* § 20.1, p. 1108 (1956) (Harper & James). A defendant's wrongful conduct is a "cause in fact" of the plaintiff's injury if "the injury would not have occurred *but for* [the] defendant's" wrongful conduct. *Id.* § 20.2, p. 1110. Factual causation, however, can be demonstrated in other ways. Cf. Pet. Br. 25 (acknowledging that "cause in fact" only "usually" means "but for") (citation omitted). The traditional "but-for" test is inappropriate in cases like this one because it would absolve culpable defendants (like petitioner) and leave victims (like Amy) without restitution for losses indisputably caused by child-pornography possessors as a class. An "aggregate" causation standard should therefore govern restitution awards under Section 2259. An approach based on a defendant's contribution to a collectively

caused harm effectuates Congress's clear intent that defendants convicted of child-pornography possession offenses pay restitution to child victims.

a. It is well settled that a "but-for" standard cannot serve as an adequate measure of factual causation in all cases. See 1 Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 27 cmt. c (2005) (Third Restatement) ("[W]hile the but-for standard * * * is a helpful method for identifying causes, it is not the exclusive means for determining a factual cause."); see also W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 41, p. 266 (5th ed. 1984) (*Prosser & Keeton*); 1 Wayne R. LaFave, *Substantive Criminal Law* § 6.4(b), p. 468 (2d ed. 2003); Richard W. Wright, *Causation in Tort Law*, 73 Cal. L. Rev. 1735, 1775 (Dec. 1985) (Wright).[8] In some cases, a "but-for" standard "results in a finding of no causation even though it is clear that the act in question contributed to the injury." Wright 1775. Where such a rule would produce unjust results by allowing admitted wrongdoers to escape responsibility and by leaving victims without any remedy, an alternative means of determining factual causation is needed. See Third Restatement § 27 cmt. c (A plaintiff should not be "worse off due to multiple tortfeasors than would have been the case if only one of the tortfeasors had existed.").

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[8] This Court adopted a "but-for" standard of factual causation in a recent employment discrimination case. See *University of Tex. Sw. Med. Ctr.* v. *Nassar*, 133 S. Ct. 2517, 2525 (2013); see also *Gross* v. *FBL Fin. Servs., Inc.*, 557 U.S. 167, 176-177 (2009). The Court in *Nassar*, however, explained that a "but-for" rule applies in the "usual" case; it did not suggest that it applies in *every* case. 133 S. Ct. at 2525.

Courts and scholars have devised different formulations of factual causation to address different categories of cases. Perhaps the most familiar are those involving "multiple sufficient causes," *i.e.*, two or more conditions that converge to cause a result when each would have been sufficient alone to cause the same result. Third Restatement § 27, Reporters' Note cmt. a ("There is near-universal recognition of the inappropriateness of the but-for standard for factual causation when multiple sufficient causes exist."). For example, two fires from separate sources combine to destroy a house. If the house would have been consumed completely by either fire alone, they are both considered a factual cause of the harm even though the "but-for" test is not satisfied for either. See *Prosser & Keeton* § 41, pp. 266-267.

The multiple causes, however, need not be *independently* sufficient to cause the injury. See Wright 1791-1792 ("The requirement that each factor have been sufficient by itself * * * is too restrictive" and "is not followed by the courts."). Wrongful conduct by one actor may be insufficient to cause the plaintiff's harm standing alone, but "when combined with conduct by other persons, the conduct overdetermines the harm, i.e., is more than sufficient to cause the harm." Third Restatement § 27 cmt. f. "When the conduct of two or more actors is so related to an event that their combined conduct, viewed as a whole, is a but-for cause of the event, and application of the but-for rule to them individually would absolve all of them, the conduct of each is a cause in fact of the event." *Prosser & Keeton* § 41, p. 268; see 1 Dan B. Dobbs et al., *The Law of Torts* § 189, p. 635 (2d ed. 2011) (Dobbs) (Factual causation may be established

if, after the conduct of the "defendants as a group is aggregated," the "combined conduct is a but-for cause of the plaintiff's harm."); Third Restatement § 27, Reporters' Note cmt. g (Even though "none of the alternative causes is sufficient by itself, * * * together they are sufficient and perhaps necessary elements of multiple sufficient causal chains.").[9]

Such an "aggregate" causation rule is appropriate if "the defendants bear[] a like relationship" to the harm and if "[e]ach seeks to escape liability for a reason that, if recognized, would likewise protect each other defendant in the group, thus leaving the plaintiff without a remedy in the face of the fact that had none of them acted improperly the plaintiff would not have suffered the harm." *Prosser & Keeton* § 41, pp. 268-269 (internal footnote omitted); see *id.* § 41, p. 268 n.40 (noting that the results reached by courts are "almost uniformly consistent" with this principle). In pollution cases, for example, each property owner who contributed to the injury is held liable "even though none of the defendants' individual contributions was either necessary or sufficient by itself for the occurrence of the injury." Wright 1792; see Dobbs § 189, p. 633; see also *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 379 F. Supp. 2d 348, 377-379 (S.D.N.Y. 2005) (adopting theory of collective liability when it was "known that the commingled

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[9] Some scholars have adopted somewhat different terminology to describe a similar test. See, *e.g.*, Wright 1774, 1788-1803 (advocating a "necessary element of a sufficient set" test under which a particular condition is considered a cause in fact of a particular harm "if it was a necessary element of a set of antecedent actual conditions that was sufficient for the occurrence of the consequence").

product caused the harm" and that the product of each supplier was "present" in the "commingled product," but it was "*not known* * * * what percentage of each supplier's goods [wa]s present in the blended product that caused the harm").[10]

b. As several courts of appeals have recognized, applying an aggregate causation standard to Section 2259 restitution requests best effectuates Congress's intent. See *Kearney*, 672 F.3d at 98-99; *Burgess*, 684 F.3d at 459-460; *United States* v. *Hargrove*, 714 F.3d 371, 374-375 (6th Cir. 2013); *Gamble*, 709 F.3d at 556 (Kethledge, J., concurring in part and concurring in the judgment); J.A. 489-491 (Davis, J., concurring in part and dissenting in part). Section 2259 requires defendants convicted of possessing child pornography to pay restitution to children (like Amy) whose sexual abuse is depicted in the images and who have suffered harm as a result. Unfortunately, defendants like petitioner are not alone. Thousands of individuals have viewed or will view pornographic images memorializing Amy's sexual abuse. And Amy has suffered, and will continue to suffer, harm as a result of their collective, illegal acts. See *Hargrove*, 714 F.3d at 376 (Clay, J., concurring in part and concurring in the judgment) (Possession of child pornography is "a crime whereby

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[10] Indeed, a defendant may be held liable even if the injury he inflicted was "negligible and harmless" standing alone, if the "cumulative effect of the many similar small injuries is some appreciable, serious damage." Harper & James § 20.3, p. 1126 n.17; see *Prosser & Keeton* § 52, p. 355 (noting that such treatment may be appropriate if "the individual knows, or is at least negligent in failing to discover, that the conduct may concur with that of others to cause damage").

individual victims are harmed by the ongoing conduct of numerous independent perpetrators.").

The individuals who have (or will) possess Amy's images are similarly situated to one another and they bear a "like relationship" to Amy's harm. *Prosser & Keeton* § 41, pp. 268-269. Each defendant has contributed (or will contribute) to her harm and, together, they are more than sufficient to cause her losses. See *Hargrove*, 714 F.3d at 377 (Clay, J., concurring in part and concurring in the judgment) ("[E]ven if conduct is insufficient by itself to cause a given harm, liability attaches when the conduct is sufficient to cause the harm when combined with the wrongful conduct of others."); *Kearney*, 672 F.3d at 98 (Aggregate cause "exists where the tortious conduct of multiple actors has combined to bring about harm, even if the harm suffered by the plaintiff might be the same if one of the numerous tortfeasors had not committed the tort."). If no one had viewed Amy's images, she would not suffer from the same psychological and emotional harm that she endures today. See *ibid.* ("[The defendant's] conduct contributed to a state of affairs in which [the victim's] emotional harm was worse than would have otherwise been the case."); see also *Prosser & Keeton* § 41, pp. 268-269 & n.40; Dobbs § 189, p. 635; Third Restatement § 27 cmts. a, f and g. Because cause in fact exists at "the aggregate level, * * * there is no reason to find it lacking on the individual level." *Kearney*, 672 F.3d at 98.

c. Petitioner, however, suggests that to satisfy Section 2259's causation requirements, the government must introduce evidence specifically linking him to some discrete and measurable loss that Amy would not have suffered "but for" his particular offense con-

duct. *E.g.*, Pet. Br. 8 & n.5, 14, 20. The district court adopted a similar rule. See J.A. 293 ("[T]he Government has the burden of proving the amount of Amy's losses directly produced by [petitioner] that would not have occurred without his possession of her images."). And at least one court of appeals vacated a restitution award because the government "fail[ed] to introduce evidence" of a loss specifically "attributable to [the defendant's] offense," such as evidence that his conduct caused the victims to need "additional therapy sessions or [caused them to] miss[] [additional] days at work." *Kennedy*, 643 F.3d at 1264-1265.

Such a stringent causation standard is inappropriate here. Amy's trauma cannot be subdivided in the way a traditional "but-for" standard would require. If petitioner had not possessed Amy's images, she still would have suffered substantial harm as a result of countless other defendants just like him. And it is practically impossible to know whether her losses would have been slightly lower if one were to subtract one defendant, or ten, or fifty. To require the government to produce evidence that petitioner's specific conduct caused Amy to miss an extra day of work, or to need an additional therapy session, is to impose an insurmountable burden that has no grounding in general causation principles or in reality. See *Lundquist*, 2013 WL 4779644, at *12.

Petitioner also briefly suggests (Br. 46) a "substantial factor" test that, as he describes it, would require the government to prove that his conduct was "alone sufficient" to cause Amy's harm. For much the same reason, that too is not a workable or appropriate standard in this context. The possession of child pornography by an individual defendant is *not* alone suf-

ficient to cause all of Amy's losses.[11] As the Seventh Circuit explained, "it is beyond implausible that the victims would have suffered the harm they did had [the defendant] been the only person in the world to view pornographic images of them." *Laraneta*, 700 F.3d at 991; see *id.* at 992 ("[O]ften psychological harm can be greater or less, and it would have been less in this case if instead of tens of thousands of images of Amy's * * * rapes being viewed on the Internet," one image "had been viewed by one person, the defendant.").

"The 'logic' of [petitioner's] argument is that there would be no remedy for the harm suffered by [victims like Amy] as a result of" the "possession of [their] images." *Kearney*, 672 F.3d at 99. Petitioner does not confront that problem, though he also does not dispute that it exists. And courts that have applied a "but-for" causation standard to restitution awards under Section 2259 acknowledge that it erects an "impossible burden." J.A. 296; see *Kennedy*, 643 F.3d at 1266 ("[I]t is likely to be a rare case where the government can directly link one defendant's viewing of an image to a particular cost incurred by the victim."). Petitioner (and defendants like him) should not be relieved of their statutory obligation to pay restitution simply because Amy would continue to suffer harm if there were one less child-pornography consumer in the world. Traditional tort-law principles of causation

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[11] An individual defendant's possession of child pornography may be independently sufficient to cause *some* of Amy's losses but, as with an individualized "but-for" standard, difficulties of proof would seriously impede (or, more likely, prevent) the government from identifying precisely which losses are attributable to which defendant.

provide a workable solution short of gutting the statute Congress enacted.

2. The defendant's offense must also proximately cause the victim's harm and losses

Once factual causation has been established, "there remains the question whether the defendant should be legally responsible for the injury." *Prosser & Keeton* § 42, pp. 272-273. Those additional limitations on the scope of liability, often referred to as proximate cause, "operate[] as a bar to the imposition of liability if policy considerations dictate that the defendant should not be liable under the circumstances." 3 Stuart M. Speiser et al., *The American Law of Torts* § 11:1, p. 380 (1986) (Speiser). A proximate-cause limitation is appropriately found in Section 2259, given its text and structure, and is applicable to all of a victim's losses. But the link between the possession of child pornography and the typical losses (*e.g.*, therapy costs) incurred by a child whose sexual abuse is depicted in the images is proximate by any definition. Accordingly, the proximate-cause limitation poses no difficulty in restitution requests of the sort at issue here.

a. The term "proximate cause" is "shorthand for the policy-based judgment that not all factual causes contributing to an injury should be legally cognizable causes." *CSX Transp., Inc.* v. *McBride*, 131 S. Ct. 2630, 2642 (2011); *id.* at 2637 ("Injuries have countless causes, and not all should give rise to legal liability."); *Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 838 (1996) (*Exxon*) ("In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond.") (quoting *Prosser & Keeton* § 41,

p. 264). "[B]ecause of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point." *McBride*, 131 S. Ct. at 2637 (quoting *Palsgraf* v. *Long Island R. Co.*, 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting)) (brackets in original); *Holmes* v. *Securities Investor Prot. Corp.*, 503 U.S. 258, 268 (1992) (Proximate cause is a "generic[]" label for "the judicial tools used to limit a person's responsibility for the consequences of that person's own acts."). "To prevent 'infinite liability,' courts and legislatures appropriately place limits on the chain of causation that may support recovery on any particular claim." *McBride*, 131 S. Ct. at 2642 (internal citation omitted).

No "consensus" exists, however, "on any one definition of 'proximate cause.'" *McBride*, 131 S. Ct. at 2642. Some ask whether the injury was "foreseeable" or the "natural and probable" consequence of the defendant's wrongful act. See *ibid.*; *id.* at 2652 (Roberts, C.J., dissenting); *Hemi Group, LLC* v. *City of N.Y.*, 559 U.S. 1, 22-23 (2010) (Breyer, J., dissenting); see also Pet. Br. 45. Others require "'some direct relation between the injury asserted and the injurious conduct alleged'" and reject "link[s] that [are] 'too remote,' 'purely contingent,' or 'indirec[t].'" *Hemi Group*, 559 U.S. at 9 (quoting *Holmes*, 503 U.S. at 268, 271, 274) (third pair of brackets in original); see also Pet. Br. 47. Some look to whether there was an "intervening" or "superseding" cause. See *Exxon*, 517 U.S. at 837; *Miller* v. *Union Pac. R. Co.*, 290 U.S. 227, 235 (1933). And still others ask whether the injury was "within the scope of the risk" created by the defendant's injurious conduct. See *Pacific Operators*, 132 S. Ct. at 692 (Scalia, J., concurring in part and

concurring in the judgment) (quoting *McBride*, 131 S. Ct. at 2652 (Roberts, C.J., dissenting)); *Hemi Group*, 559 U.S. at 23-24 (Breyer, J., dissenting).

In the end, proximate cause remains a "flexible concept." *Bridge* v. *Phoenix Bond & Indem. Co.*, 553 U.S. 639, 654 (2008). The various tests simply "guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances." *Associated Gen. Contractors* v. *California State Council of Carpenters*, 459 U.S. 519, 536-537 (1983). And the cases "furnish illustrations of situations which judicious men upon careful consideration have adjudged to be on one side of the line or the other." *Exxon*, 517 U.S. at 839 (quoting *Prosser & Keeton* § 42, p. 279).[12]

b. This Court has routinely read a proximate-cause limitation into statutes, even when no such limitation was express, when neither text nor context required otherwise. In *Associated General Contractors*, for example, the Court held that the "by reason of" language in the Clayton Act, 15 U.S.C. 15, incorporated a proximate-cause requirement. 459 U.S. at 529-535. And, in *Holmes*, this Court held that the same "by reason of" language in the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1964(c), similarly included a proximate-cause limitation. 503 U.S. at 265-268; see *Hemi Group*, 559 U.S. at 9; *Anza* v. *Ideal Steel Supply Corp.*, 547 U.S. 451, 453 (2006); see also *Pacific Operators*, 132 S. Ct. at 692 (Scalia, J., concurring in part and concurring in the judgment) (arguing that the phrase "as the result of" in the Outer Continental Shelf Lands Act, 43 U.S.C. 1333(b),

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[12] Courts generally apply proximate-cause principles in a more liberal manner when the underlying tortious conduct was intentional. See Speiser § 11:23, pp. 458-459.

lends itself to a "proximate-cause standard"); cf. *id.* at 691 (majority opinion) (adopting a "substantial-nexus" test without discussing proximate cause).[13]

In those cases, the Court recognized that the statutory language could "of course" be read as requiring only cause in fact. *Holmes*, 503 U.S. at 265-266; see *Associated Gen. Contractors*, 459 U.S. at 529 ("A literal reading of the statute is broad enough to encompass every harm that can be attributed directly or indirectly to the consequences of an antitrust violation."). But it also recognized that such a reading was "hardly compelled." *Holmes*, 503 U.S. at 266. Because of "the very unlikelihood that Congress meant to allow all factually injured plaintiffs to recover," the Court declined to give the statutes "such an expansive reading." *Ibid.*; see *Associated Gen. Contractors*, 459 U.S. at 529-535 (declining to give the statute "such an open-ended meaning" after considering congressional intent).

c. In Section 2259, Congress used language often associated with a proximate-cause standard. Section 2259(c) defines a "victim" as an "individual harmed *as a result of* a commission of a crime under [Chapter

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[13] In *McBride*, a case involving the Federal Employers' Liability Act (FELA), 45 U.S.C. 51 *et seq.*, the Court concluded that Congress had adopted a more relaxed "test for proximate causation applicable in FELA suits," but had not "eliminated the *concept* of proximate cause" altogether. 131 S. Ct. at 2641 (citation omitted); see *Norfolk S. Ry.* v. *Sorrell*, 549 U.S. 158, 178 (2007) (Ginsburg, J., concurring in the judgment). FELA, moreover, includes "broad" causation language: it holds railroads liable for an employee's injury or death "*resulting in whole or in part*" from the carrier's negligence. *McBride*, 131 S. Ct. at 2636 (quoting 45 U.S.C. 51); see *id.* at 2644 n.14 (distinguishing other statutes with different language).

110]." 18 U.S.C. 2259(c) (emphasis added). And Section 3664(e) provides that the government bears the "burden of demonstrating the amount of the loss sustained by a victim *as a result of* the offense." 18 U.S.C. 3664(e) (emphasis added); see 18 U.S.C. 2259(b)(2). Such causal language has often been understood to incorporate basic principles of proximate cause. See *Hemi Group*, 559 U.S. at 9 ("by reason of"); *Associated Gen. Contractors*, 459 U.S. at 529-535 ("by reason of"); *Pacific Operators*, 132 S. Ct. at 692 (Scalia, J., concurring in part and concurring in the judgment) ("as the result of"). And it is reasonable to presume that Congress was aware of this Court's decisions at the time it enacted Section 2259. Cf. *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 176 (2005).

Congress reaffirmed its intent to incorporate traditional proximate-cause principles by specifically limiting recoverable losses to those "suffered by the victim as a *proximate* result of the offense." 18 U.S.C. 2259(b)(3)(F) (emphasis added). No one disputes that a proximate-cause standard applies to "other losses," *i.e.*, those not specifically enumerated. But the proximate-cause standard should not be limited to the "catchall" category. The losses enumerated in Subparagraphs (A) through (E) are "among the 'losses suffered by the victim as a proximate result of the offense.'" *United States* v. *Hayes*, 135 F.3d 133, 137-138 (2d Cir. 1998) (interpreting virtually identical language in 18 U.S.C. 2264(b)(3)); see *Federal Mar. Comm'n* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 734 (1973) ("It is, of course, a familiar canon of statutory construction that [catchall] clauses are to be read as

bringing within a statute categories similar in type to those specifically enumerated.").

Congress simply enumerated certain losses "that [Chapter 110] restitution offenses *typically* proximately cause." *Fast*, 709 F.3d at 721; see *Kearney*, 672 F.3d at 97 (The "express inclusion" of certain losses "indicates that Congress believed such damages were sufficiently foreeseable to warrant their enumeration in the statute."). That does not, however, mean that Congress intended a victim's every medical expense, child care cost, or legal fee to be charged to the defendant—however far removed from his offense of conviction. See *Fast*, 709 F.3d at 721-722 ("Congress did not mean that a *specific* defendant *automatically* proximately causes those losses *in every case*."); *Monzel*, 641 F.3d at 536 ("[N]othing in the text or structure of [Section] 2259 leads us to conclude that Congress intended to negate the ordinary requirement of proximate cause."). Inclusion of "proximate result" language in Subparagraph (F) should not negate the proximate-cause principles that would otherwise govern the remainder of the statute. "Had Congress meant to abrogate the traditional requirement for everything *but* the catch-all, surely it would have found a clearer way of doing so." *Monzel*, 641 F.3d at 536-537.

That reading accords with congressional intent. Section 2259 undoubtedly has a "broad restitutionary purpose." J.A. 446, 454 n.9, 456, 478. But it is highly unlikely "Congress meant to allow all factually injured" persons to recover for all "factually" caused losses. *Holmes*, 503 U.S. at 266; see S. Rep. No. 138, 103d Cong., 1st Sess. 56 (1993) (explaining that predecessor bill, which included the same causation lan-

guage as Section 2259, "requires sex offenders to pay costs incurred by victims as a *proximate* result of a sex crime") (emphasis added). Absent a proximate-cause requirement, even indirect or remote "victims" could seek restitution. Amy's future employer, for example, could seek restitution for "lost income," alleging that he suffered "harm" as a result of the defendant's child-pornography possession offense when Amy missed several days of work because of emotional trauma which, in turn, caused him to lose customers. Cf. *Gamble*, 709 F.3d at 550 (posing example of child-pornography collector's computer transmitting a computer virus that damages another person's computer). And, absent a proximate-cause limitation, direct victims (like Amy) could seek restitution for enumerated losses far removed from the defendant's offense. For example, Amy could seek restitution for medical expenses (an enumerated loss under Section 2259(b)(3)(A)), if she had a car accident on the way to her therapist's office. See *Monzel*, 641 F.3d at 537 n.7 (explaining that, without a proximate-cause requirement, such an "intervening" or "superseding" cause would have no impact on the analysis); *Burgess*, 684 F.3d at 458 n.9 (same); see also *Hargrove*, 714 F.3d at 375 ("[A]lthough [Section] 2259(b)(3)(C) allows restitution for necessary child care expenses, the 'loss of a sex offender as a babysitter' is not 'the sort of harm contemplated by the statute's drafters' and thus, proximate cause does not exist to justify restitution for child care costs incurred to replace that babysitter.") (quoting *Gamble*, 709 F.3d at 550).

d. In rejecting a proximate-cause standard, the Fifth Circuit relied heavily on the "rule of the last

antecedent," which provides that "a limiting clause or phrase * * * should ordinarily be read as modifying only the noun or phrase that it immediately follows." J.A. 451-460 (quoting *Barnhart* v. *Thomas*, 540 U.S. 20, 26 (2003)); see *Jama* v. *Immigration & Customs Enforcement*, 543 U.S 335, 343-344 (2005). But another canon of construction counsels the opposite result: "[w]hen several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." *Porto Rico Ry., Light & Power Co.* v. *Mor*, 253 U.S. 345, 348 (1920) (*Porto Rico*); see *United States* v. *Bass*, 404 U.S. 336, 339-340 (1971). Stated in the abstract, the two canons appear to "contradict[]" each other. *Laraneta*, 700 F.3d at 989; see *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 263 (1994) ("It is not uncommon to find 'apparent tension' between different canons of statutory construction.").

Neither canon, however, is "absolute" and both are "overcome by other indicia of meaning." *Barnhart*, 540 U.S. at 26; see *Porto Rico*, 253 U.S. at 348; see also, *e.g.*, *United States* v. *Hayes*, 555 U.S. 415, 425-426 (2009) (declining to apply the rule of the last antecedent when it would have required the Court "to accept two unlikely premises"); *Nobelman* v. *American Sav. Bank*, 508 U.S. 324, 330-332 (1993) (declining to apply the rule of the last antecedent when there was a "more reasonable" interpretation). For all the reasons set forth above, a technical application of the last-antecedent canon cannot overcome the reasons

for applying a proximate-cause limitation before ordering restitution for any of a victim's losses.[14]

e. The causal link between the possession of child pornography and the typical losses (*e.g.*, therapy costs) incurred by a child whose sexual abuse is memorialized in the images is proximate by any definition. Cf. Harper & James § 20.6, p. 1160 ("The fact is that in a great number of situations it makes very little difference what test is used.").

The harm endured and the losses incurred by victims (like Amy) as a result of individuals (like petitioner) possessing images depicting their sexual abuse is reasonably foreseeable. See *Gamble*, 709 F.3d at 547 (losses must be, *inter alia*, "reasonably foreseeable") (citation omitted). Section 2259 was "enacted against a body" of this Court's cases making "clear that injury to the child depicted in the child pornography, including injury that will require mental-health treatment, is a readily foreseeable result" of a child-pornography possession offense. *Kearney*, 672 F.3d at 97; see *Lundquist*, 2013 WL 4779644, at *10 ("[O]ne

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[14] The Fifth Circuit also briefly noted that "other restitution statutes contain more forceful causation requirements." J.A. 465 n.14 (noting that other restitution statutes define a "victim" as "a person directly and proximately harmed as a result of the commission" of a federal offense) (quoting 18 U.S.C. 3663A(a)(2)). That reads too much into too little. The CVRA also defines a "crime victim" as "a person directly and proximately harmed as a result of the commission" of a federal offense. 18 U.S.C. 3771(e). If the definition of "victim" in Section 2259 (and other restitution statutes, see, *e.g.*, 18 U.S.C. 1593(c), 2248(c), 2264(c)) were construed to be broader than the definition of "crime victim" in the CVRA, the rights the CVRA affords would be unavailable to some Section 2259 "victims." It is exceedingly unlikely Congress intended such an incongruous result.

of the foreseeable risks of possessing child pornography is that the victim may eventually learn about the crime in some manner."). It should go without saying that "every adult who watches videos of young girls being raped should reasonably foresee that he is inflicting great harm upon those victims." *Gamble*, 709 F.3d at 557.

Indeed, the losses for which Amy seeks recovery (*i.e.*, therapy, lost income, attorneys' fees and other litigation costs) "were sufficiently foreseeable to warrant their enumeration in the statute." *Kearney*, 672 F.3d at 97; see *Gamble*, 709 F.3d at 549 ("The express inclusion of costs like medical expenses and attorneys' fees indicates Congress's understanding that such losses were indeed foreseeable consequences of such crimes."). Although the enumeration of a specific loss in Section 2259(b)(3) does not definitively establish a sufficiently close relationship to warrant restitution, it is certainly suggestive of that result.

For much the same reason, a defendant's act of possessing child pornography depicting a particular victim has a sufficiently "direct relation" to the harm and losses suffered by that victim. *Gamble*, 709 F.3d at 547 (losses must be, *inter alia*, "directly attributable" to the defendant's offense) (citation omitted); see *Lundquist*, 2013 WL 4779644, at *5. The causal chain is short and uninterrupted: defendants possess pornographic images of a child's sexual abuse and that child is damaged as a result. The origin of the harm in the initial sexual abuse does not absolve a subsequent wrongdoer, like petitioner, of responsibility for aggra-

vating the victim's injury and inflicting additional damage. See Harper & James § 20.3, p. 1124.[15]

The harm and losses suffered by victims like Amy are also well within the scope of risk. See *Gamble*, 709 F.3d at 549 ("Generally if the injury is the type that the statute was intended to prohibit, it is more likely to be proximately caused."). For example, Amy seeks restitution for future therapy costs and lost wages, both caused by the anxiety, post-traumatic stress, and paranoia she suffers because thousands of people have viewed pictures of her being raped. *E.g.*, J.A. 52, 59-86, 90-93. That is precisely the sort of injury the criminal prohibition was designed to deter and the restitution statute to compensate. *Gamble*, 709 F.3d at 550 ("The harm endured by the subject of child pornography upon realizing that others are viewing her image is part of what the child pornography prohibitions are designed to deter.").

In the end, proximate cause is a policy judgment about where to draw the line in a potentially limitless causal chain. Whatever difficulties may arise at the margins, restitution requests like Amy's fall comfortably within any reasonable causal limit.

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[15] Whether Amy's restitution request in this case includes any losses incurred *solely* as a result of her uncle's sexual abuse (see Pet. Br. 13 (quoting J.A. 294)) is a question for the factfinder on remand. See *Lundquist*, 2013 WL 4779644, at *13-*14 (concluding that the record demonstrated that Amy's uncle "continued to be a proximate cause of some of Amy's losses" and remanding for the district court to "apportion some of Amy's total losses to her uncle").

C. The Case-Specific Arguments Raised By Petitioner Are Without Merit

Petitioner alludes to case-specific arguments that, if accepted, would preclude restitution in this case and others like it. To the extent the Court chooses to address those arguments, they are without merit.

1. Petitioner first contends (Br. 64-65) that "a defendant cannot cause harm prior to the date of his offense" and suggests that is what happened here. It is of course true that a person cannot cause an event that has already occurred. See Third Restatement § 26 cmts. c, k; *id.* § 27 cmt. h. But petitioner's offense was committed on or around July 11, 2008. PSR ¶¶ 1, 9-11. And Amy has not sought recovery for any losses before January 1, 2009. J.A. 92-93, 164-165. Although a person generally cannot be held responsible for losses incurred before their offense conduct, see *Lundquist*, 2013 WL 4779644, at *14, no such timing issue exists here.

The expert reports submitted in support of Amy's restitution request (prepared in late 2008) also postdate petitioner's offense. See p. 5, *supra*. Although they predate his January 9, 2009, *arrest*, the harm inflicted by defendants like petitioner is caused by their conduct (*i.e.*, the actual possession of child pornography), not only their arrest. But even if the arrest date were the relevant comparator (see Pet. Br. 6, 51 (relying on date of arrest); *Lundquist*, 2013 WL 4779644, at *8-*10 (same)), the requisite causal connection still exists. Amy's expert reports estimate future loss based on an ongoing (not a past) harm. They describe the harm that Amy has endured and will continue to endure from all the individuals who possess, view, and distribute Amy's images—past,

present, and future. Indeed, Dr. Silberg's report opined that Amy would need lifetime therapy as a result of the ongoing trauma. J.A. 86. Petitioner was certainly free to introduce evidence demonstrating that her projections are no longer accurate, see Pet. Br. 8-11 & n.9 (noting conflicting expert reports), and the district court was free to consider such evidence. But a court could also reasonably infer that, two months after Dr. Silberg's report, the harm inflicted by the large group of individuals possessing Amy's images (of which petitioner is a part) had not miraculously ceased.

A contrary rule would impose an unacceptable burden on victims. Unfortunately, thousands of individuals have viewed and continue to view the images depicting Amy's sexual abuse. And many have been or will be charged with a Chapter 110 offense for that conduct. A defendant whose arrest, by happenstance, falls after the latest evaluation and updated report should not escape restitution for a victim's losses going forward. Absent a significant temporal gap, Amy should not have to continually update her victim-impact statement and subject herself to constant psychological evaluations in order to keep up with the continual stream of offenders. The government can meet its burden without having to update the evidentiary support on a daily, weekly, or monthly basis.

2. Petitioner also appears to suggest (Br. 50, 66; see Michael Wright Br. 4, 18) that he could not have caused any harm to Amy and cannot be ordered to pay restitution for any of her losses because Amy had no knowledge of his particular conduct. See *Lundquist*, 2013 WL 4779644, at *9 (relying on district court's finding that Amy learned of the defendant's "posses-

sion of her image"). Amy's harm and her resulting losses, however, stem at least in part from "the knowledge that her image is being generally circulated" and that "a *group* of people [are] viewing her images." *Gamble*, 709 F.3d at 549 n.1, 551. That more general knowledge does not necessitate awareness of each and every defendant that has been arrested for (or convicted of) possessing her images. Moreover, by seeking restitution, Amy has manifested awareness of her plight. That should be enough.[16]

D. Questions Involving The Allocation Of Aggregate Losses Should Be Left To The District Court's Discretion

Once the government establishes that a defendant caused some of the victim's losses in the manner set forth above, the question remains: how much to award in restitution? That question, while related to causation, is distinct in certain respects. See *Gamble*, 709 F.3d at 550-551 (inquiries are "[c]losely intertwined" but "distinct"). And it has three potential

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[16] A victim who does not know that her image is being circulated and viewed on an ongoing basis would presumably be unable to demonstrate the requisite causal connection unless she had knowledge of the particular defendant's conduct. But, for victims like Amy, it would be quite perverse to condition restitution on her learning each and every time that a new person is viewing her image. "Congress was attempting to compensate the victims of child pornography, not to intensify the harm they have already suffered as a condition of obtaining restitution." *Kearney*, 672 F.3d at 99; see *Kennedy*, 643 F.3d at 1255 (noting another child victim's statement that "[p]ractically every time I've [gone] to get the mail, there have been two or three of these notifications," which are "constant reminders of the horrors of my childhood"); cf. 18 U.S.C. 3664(g)(1) ("No victim shall be required to participate in any phase of a restitution order.").

answers. The first, as found by the district court, is nothing. The second, adopted by the court of appeals and advanced by Amy, is all of a victim's aggregate losses, jointly and severally. And the third, adopted by every other court of appeals to have considered the issue, is somewhere between all or nothing, through allocation by the district court. The first two approaches are each fatally flawed in different respects; the third (allocation) best comports with the statutory scheme and with the relevant equities.

1. The restitution award must be greater than zero

The district court declined to award Amy any restitution and petitioner defends that judgment. The district court's decision, however, rested on an inappropriate causation standard that required a direct link between petitioner's particular offense and a specific and measurable quantum of Amy's losses. For the reasons explained above, that showing is not required to establish the requisite causal connection. See pp. 24-27, *supra*. And once it is established (under the proper standard) that the defendant caused at least some of the victim's losses, the restitution award must be something greater than zero.

That remains true regardless of the difficulties a district court may encounter in arriving at an appropriate restitution award. As petitioner acknowledges (Br. 49), courts need only make a reasonable estimate of loss. See *Lundquist*, 2013 WL 4779644, at *12. Any difficulties in making that estimate can be addressed through a reasonable exercise of discretion. And that is preferable to the "unlovely spectacle of turning a [victim] away without redress although [s]he has shown that [s]he has suffered some damage at the hands of *each* of several defendant wrongdoers and

what the aggregate amount of the damages comes to." Harper & James § 20.3, p. 1128. Unlike other restitution statutes, Section 2259 does not permit a district court to deny restitution if "determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process." 18 U.S.C. 3663A(c)(3); see 18 U.S.C. 3663(a)(1)(B)(ii) (providing for similar exception); 18 U.S.C. 2259(a) (providing that the court must order restitution "[n]otwithstanding section 3663 or 3663A"). Rather, a court "shall" order restitution for child-pornography possession offenses, so long as the causation requirements have been satisfied in the manner set forth above. 18 U.S.C. 2259(a).

2. Joint and several liability for all of the victim's aggregate losses is not appropriate

The Fifth Circuit opted for the other extreme: it remanded for the district court to order restitution for all of Amy's aggregate losses (calculated to be approximately $3.4 million), on a joint and several basis. J.A. 479. That approach is not required by statute; it is practically unworkable in this context; and it may be unduly harsh.

a. The statute does not support engrafting a joint-and-several-liability regime onto Section 2259 restitution awards of the sort at issue here. The Fifth Circuit relied on two provisions: (1) Section 2259(b)(1), which requires the defendant to pay the victim "the full amount of the victim's losses," 18 U.S.C. 2259(b)(1); and (2) Section 3664(h), which permits a court to "make each defendant liable for payment of the full amount of restitution" if "the court finds that more than 1 defendant has contributed to the loss of a victim," 18 U.S.C. 3664(h). See J.A. 451, 466-470 &

n.16. Neither requires or supports joint and several liability in this case.

The court of appeals misconstrued the phrase "full amount of the victim's losses" to encompass losses caused by others. The only losses a defendant is responsible for are those of the "victim," *i.e.*, a person harmed "as a result of" *the defendant's* offense. 18 U.S.C. 2259(c); see 18 U.S.C. 2259(b)(3) (defining "full amount of the victim's losses" as certain enumerated and unenumerated "losses suffered by the victim as a proximate result of the offense"). Section 2259, therefore, does not *require* a district court to order a defendant to pay restitution for all losses incurred as a result of the cumulative impact of all similar offenders.

Section 3664(h) also fails to provide statutory support for the court of appeals' decision. That provision states in pertinent part: "[i]f the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution." 18 U.S.C. 3664(h). Section 3664(h) applies to restitution awards only to the extent that multiple defendants are sentenced in the same proceeding (or charged under the same indictment). The text cannot reasonably be stretched to cover different defendants, in different cases, before different judges, in different jurisdictions throughout the country, over a course of many years. See *Lundquist*, 2013 WL 4779644, at *15; *Fast*, 709 F.3d at 723 n.6; *Laraneta*, 700 F.3d at 992-993; cf. *United States* v. *Aumais*, 656 F.3d 147, 156 (2d Cir. 2011); *Monzel*, 641 F.3d at 538-539. "[T]he" court only has jurisdiction over defendants before it. And while it could perhaps "find[]" that other defendants

(not before the court) "contributed to the loss of a victim," it could not "make" those other defendants "liable" for anything. See *Lundquist*, 2013 WL 4779644, at *15. Moreover, many individuals who have "contributed to the loss of a victim" are not "defendants," as that term is used in Section 3664(h). At best, the group of responsible parties includes many former "defendants" (*i.e.*, those previously convicted of a Chapter 110 offense involving the same victim) and many potential future "defendants" (*i.e.*, persons engaging in conduct in violation of Chapter 110 involving the same victim who have not been arrested for their conduct). In sum, the Fifth Circuit has not overcome the linguistic hurdles necessary to rely on Section 3664(h) to justify (let alone compel) a joint-and-several-liability award in the circumstances at issue here.[17]

b. Contrary to the Fifth Circuit's contention, "[t]he joint and several liability mechanism" does not

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[17] The court of appeals briefly alluded to the common law, suggesting that joint and several liability is appropriate because the injury is "indivisible." See J.A. 469 & n.17. The injury here, however, may not be "indivisible" in the relevant sense. An injury is "indivisible" if the harm is "not even theoretically apportionable, either because none of it would have happened but for defendant's negligence or because there would be no feasible way, even in the light of omniscience, to attribute any identifiable part of it to defendant's act rather than another cause." Harper & James § 20.3, p. 1123. The injury here may be better characterized as "divisible" because "each of several causes * * * produces *some* (but not *all* the) harm." *Id.* § 20.3, p. 1123. Even though it is admittedly "hard" or perhaps "impossible on the facts practically available to tell just how much of the harm each of these causes brought about," so long as "they are capable of separation," "at least in *theory* (i.e., to the eye of omniscience)," then some form of allocation is generally appropriate. *Id.* § 20.3, pp. 1123-1126.

"appl[y] well in these circumstances." J.A. 468-469; see *id.* at 470. Rather, imposing joint and several liability on hundreds of criminal defendants in different courts at different times would be "extraordinarily clumsy." *Laraneta*, 700 F.3d at 993.

Contribution is both legally and practically unavailable to Chapter 110 defendants. There is no "general federal right to contribution." *Northwest Airlines, Inc.* v. *Transport Workers Union of Am.*, 451 U.S. 77, 96-97 (1981). "[F]ederal courts, unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers." *Id.* at 95. And, absent statutory authorization (express or clearly implied), this Court has declined to fashion a "right to contribution." *Id.* at 98-99 (declining to recognize a right to contribution under the Equal Pay Act of 1963 or Title VII of the Civil Rights Act of 1964); see *Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 646-647 (1981) (declining to recognize a right to contribution under the Sherman or Clayton Acts); cf. *Musick, Peeler & Garrett* v. *Employers Ins.*, 508 U.S. 286, 290-294 (1993) (distinguishing implied private rights of action modeled on related statutory actions affording contribution). Nothing in Sections 2259 or 3664 provides such a right and, without a statutory source, defendants are left with no federal cause of action.

In any event, as a practical matter, contribution would be at best clumsy and, at worst, counterproductive. "[T]here is no simple way for the defendants to discover who else has been convicted of possession or receipt [or distribution or transportation] of [Amy's] images." *Gamble*, 709 F.3d at 552. An individual defendant has no right to be informed when a new

case arises. *Ibid.* Defendants convicted of Chapter 110 offenses, moreover, are often prohibited from associating with other sex offenders. See *id.* at 553. Such special conditions of supervised release would make it difficult for defendants to seek contribution from others similarly convicted of Chapter 110 offenses involving the same victim. *Ibid.* But even if such interaction falls outside the scope of prohibited association, a restitution scheme designed to compensate child-pornography victims should not be read to incorporate a joint-and-several-liability mechanism that would incentivize sex offenders to network with others who share their predilection for child pornography. *Ibid.*

c. The approach adopted by the Fifth Circuit also may result in restitution awards that are wholly disproportionate to the harm inflicted by an individual defendant convicted of a child-pornography possession offense. See *Gamble*, 709 F.3d at 552 (joint and several liability "indefensibly hold[s] defendants responsible for losses they did not cause or only caused in a most attenuated sense"); see also J.A. 475 (acknowledging that "imposition of full restitution may appear harsh"); cf. 2 Restatement (Second) of Torts 2d § 433B(2) cmt. e (1963 & 1964) ("[T]here may be so large a number of actors, each of whom contributes a relatively small and insignificant part to the total harm, that the application of the rule [of joint and several liability] may cause disproportionate hardship to defendants."). For example, Amy is seeking approximately $3.4 million in restitution. Although petitioner's possession of two of Amy's images caused her harm, it did not cause losses exceeding $3 million. If petitioner had been the only person to possess Amy's

images, she would have been harmed—but not to the same degree. See *Laraneta*, 700 F.3d at 991, 992. That others have engaged in the same wrongful conduct, and that their collective actions have caused Amy to suffer losses far greater than she would have otherwise endured had the individual defendant's conduct stood alone, does not justify holding a defendant (like petitioner) responsible for losses he indisputably did not cause.[18]

3. The district court should have discretion to allocate a victim's aggregate losses

The district court should have discretion to allocate a victim's aggregate losses in a reasonable manner. Allocation is a pragmatic solution that fully effectuates the statutory purpose. It is a fair and administratively feasible way to provide full restitution to victims, to distribute responsibility among the entire group of defendants who collectively caused the victim's losses, and to ensure that an individual defendant is not held responsible for losses he could not possibly have caused.[19] With the exception of the

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[18] Petitioner's reliance on (Br. 58-66) the Eighth Amendment's Excessive Fines Clause is both unnecessary to conclude that allocation of restitution is appropriate and is, in any event, unfounded. A compensatory restitution award, under any reasonable formula, is not an excessive fine. And the size of the restitution award should not transform it into a constitutionally "excessive" penalty, especially given the other prescribed sanctions. See 18 U.S.C.A. 2252(b)(2) (2012), 18 U.S.C. 3571(b)(3) (statutory maximum of 10 years in prison (20 years if the images involved a prepubescent minor or a minor under the age of 12), fine of $250,000, or both).

[19] An allocation approach is consistent with this Court's decision in *Hughey* v. *United States*, 495 U.S. 411, 415-422 (1990), because a defendant's restitution obligation is based on his offense of conviction, *e.g.*, possession of images of child pornography depicting the

Fifth Circuit, every court of appeals to have considered the issue has adopted an allocation approach that affords district courts sufficient flexibility to arrive at a reasonable restitution award. See, *e.g.*, *Lundquist*, 2013 WL 4779644, at *12-*14 (2d Cir.); *Hargrove*, 714 F.3d at 375-376 (6th Cir.); *Benoit*, 713 F.3d at 22 n.8 (10th Cir.); *Kearney*, 672 F.3d at 100-101 (1st Cir.).

Allocation is not an exact science, and it does not have to be. "Absolute precision is not required" and a district court should have "leeway to resolve uncertainties with a view towards achieving fairness to the victim." *Kearney*, 672 F.3d at 100 (internal quotation marks and citations omitted); see *Lundquist*, 2013 WL 4779644, at *12-*13 (declining to impose an "exacting standard for calculating loss"); *Monzel*, 641 F.3d at 540 (Because "the harm is ongoing and the number of offenders impossible to pinpoint," calculating the appropriate award "will inevitably involve some degree of approximation.").

As a practical matter, in Section 2259 cases involving defendants like petitioner, the government will not be able to prove precisely which losses an individual defendant caused—with mathematical precision or otherwise. See pp. 24-27, *supra*. But those difficulties of proof should not relieve a defendant from paying any restitution to the known victims of his crimes. In this context, district courts should reasonably allocate a victim's aggregate losses based on the individual defendant's relative contribution to such losses.[20]

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victim's sexual abuse, not on uncharged conduct or conduct for which the defendant was charged but not convicted.

[20] That approach has been adopted by courts in other similar circumstances. See, *e.g.*, *Prosser & Keeton* §§ 41, 52, pp. 271-272, 350-352. For example, if a plaintiff has been injured by a drug, but

There are a variety of permissible ways to allocate a victim's aggregate losses among similarly situated defendants in order to arrive at a reasonable restitution award under Section 2259. Some losses, such as attorneys' fees, are easily divisible. See 18 U.S.C. 2259(b)(3)(E). To allocate other losses, courts may consider a number of factors including, for example, the number of criminal defendants who contributed to the victim's harm, as well as "whether the defendant produced or distributed images of the victim; how many images the defendant possessed; and any other fact relevant to measuring the defendant's culpability relative to the other relevant actors." *Gamble*, 709 F.3d at 557 (Kethledge, J., concurring in part and concurring in the judgment). Courts may apply a reasonable formula to arrive at a starting point for further analysis. See, *e.g.*, *Lundquist*, 2013 WL 4779644, at *12; *Hargrove*, 714 F.3d at 375-376; cf. *Benoit*, 713 F.3d at 22 n.8. And courts may look to the restitution orders issued in other similar cases. See, *e.g.*, *Kearney*, 672 F.3d at 100-101. In the end, district courts should be given significant leeway and appellate courts should defer to their reasonable exercise of that discretion. See *Lundquist*, 2013 WL 4779644, at *13 ("As the district court is the fact finder in disputes over the amount of restitution, its method of calculating loss" is "entitled to deference.").

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it is unknown which defendant manufactured the precise product ingested by the plaintiff, some courts have imposed liability upon "proof that the defendants were manufacturers of a substantial share of the drug on the market." *Id.* § 41, p. 271. Rather than deprive the plaintiff of any remedy, some courts have allocated damages based on market share. *Id.* § 52, pp. 351-352.

CONCLUSION

The judgment of the court of appeals, remanding the case for an award of restitution, should be affirmed consistent with the principles set forth in this brief.

Respectfully submitted.

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STATUTORY APPENDIX

18 U.S.C. 3771 provides in pertinent part:

Crime victims' rights

(a) RIGHTS OF CRIME VICTIMS.—A crime victim has the following rights:

(1) The right to be reasonably protected from the accused.

(2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.

(3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.

(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.

(5) The reasonable right to confer with the attorney for the Government in the case.

(6) The right to full and timely restitution as provided in law.

(7) The right to proceedings free from unreasonable delay.

(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

(b) RIGHTS AFFORDED.—

(1) IN GENERAL.—In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a). Before making a determination described in subsection (a)(3), the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding. The reasons for any decision denying relief under this chapter shall be clearly stated on the record.

(2) HABEAS CORPUS PROCEEDINGS.—

(A) IN GENERAL.—In a Federal habeas corpus proceeding arising out of a State conviction, the court shall ensure that a crime victim is afforded the rights described in paragraphs (3), (4), (7), and (8) of subsection (a).

(B) ENFORCEMENT.—

(i) IN GENERAL.—These rights may be enforced by the crime victim or the crime victim's lawful representative in the manner described in paragraphs (1) and (3) of subsection (d).

(ii) MULTIPLE VICTIMS.—In a case involving multiple victims, subsection (d)(2) shall also apply.

(C) LIMITATION.—This paragraph relates to the duties of a court in relation to the rights of a

crime victim in Federal habeas corpus proceedings arising out of a State conviction, and does not give rise to any obligation or requirement applicable to personnel of any agency of the Executive Branch of the Federal Government.

(D) DEFINITION.—For purposes of this paragraph, the term "crime victim" means the person against whom the State offense is committed or, if that person is killed or incapacitated, that person's family member or other lawful representative.

(c) BEST EFFORTS TO ACCORD RIGHTS.—

(1) GOVERNMENT.—Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a).

(2) ADVICE OF ATTORNEY.—The prosecutor shall advise the crime victim that the crime victim can seek the advice of an attorney with respect to the rights described in subsection (a).

(3) NOTICE.—Notice of release otherwise required pursuant to this chapter shall not be given if such notice may endanger the safety of any person.

(d) ENFORCEMENT AND LIMITATIONS.—

(1) RIGHTS.—The crime victim or the crime victim's lawful representative, and the attorney for the Government may assert the rights described in sub-

section (a). A person accused of the crime may not obtain any form of relief under this chapter.

(2) MULTIPLE CRIME VICTIMS.—In a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings.

(3) MOTION FOR RELIEF AND WRIT OF MANDAMUS.—The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall take up and decide any motion asserting a victim's right forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed. In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.

(4) ERROR.—In any appeal in a criminal case, the Government may assert as error the district court's

denial of any crime victim's right in the proceeding to which the appeal relates.

(5) LIMITATION ON RELIEF.—In no case shall a failure to afford a right under this chapter provide grounds for a new trial. A victim may make a motion to re-open a plea or sentence only if—

(A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied;

(B) the victim petitions the court of appeals for a writ of mandamus within 14 days; and

(C) in the case of a plea, the accused has not pled to the highest offense charged.

This paragraph does not affect the victim's right to restitution as provided in title 18, United States Code.

(6) NO CAUSE OF ACTION.—Nothing in this chapter shall be construed to authorize a cause of action for damages or to create, to enlarge, or to imply any duty or obligation to any victim or other person for the breach of which the United States or any of its officers or employees could be held liable in damages. Nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.

(e) DEFINITIONS.—For the purposes of this chapter, the term "crime victim" means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia. In the case of a crime victim who is under 18 years of age,

incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter, but in no event shall the defendant be named as such guardian or representative.

* * * * *

RESPONDENT'S BRIEF

RECORD
AND
BRIEFS

SUPREME COURT, U.S.
FILED
DEC 1 2013

No. 12-8561

In the Supreme Court of the United States

DOYLE RANDALL PAROLINE, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Amy and the government agree that a defendant convicted of a child-pornography possession offense is a cause in fact of the victim's harms under an aggregate-causation theory (Amy Br. 13, 42) and that proximate-causation principles pose no obstacle to restitution in this case (Br. 44). Amy and the government nonetheless part company on several analytical premises—and, most significantly, on whether apportionment of restitution, rather than joint and several liability, is appropriate. For the reasons discussed below, a reasonable apportionment of restitution—the approach taken in the overwhelming majority of lower court decisions that have awarded restitution—is fair and feasible and provides the proper approach for determining a reasonable restitution award in this case.

A. Factual Causation Is Required And Is Satisfied By A Showing Of Aggregate Harm

On factual causation, Amy and the government fully agree. Amy Br. 42 (citing U.S. Br. 19-27). Amy agrees (Br. 7, 13, 17, 39-40) that factual causation is required. She explains (Br. 7, 13) that the necessary causal connection does not require proof of a specific link between a victim's particular losses and the defendant's conduct. She shows (Br. 21-22) why the individualized "but for" standard (advocated by petitioner and adopted by the district court) would impose an insurmountable burden and thwart Congress's clear intent to provide restitution to child victims. And she advocates (Br. 42-43) an "aggregate" causation standard that is readily met here.

B. Proximate Causation Is Also Required But It Presents No Obstacle Here

Amy and the government also agree that petitioner (and others like him) cannot "hide behind proximate cause principles to avoid responsibility." Amy Br. 43. The link between the possession of child pornography and the typical losses (*e.g.*, therapy costs) incurred by a child whose sexual abuse is depicted in the images is proximate by any definition. U.S. Br. 35-37; see Amy Br. 16-17, 60. And the answer to the proximate-cause question fails to resolve the ultimate issue: how much to award in restitution. See Parts C and D, *infra*.

Although Amy reaches the "same destination" as the government on this issue (Br. 43-44), she rejects any proximate-cause requirement for victim status and for the enumerated categories of losses. Every court of appeals with criminal jurisdiction (but one) disagrees. U.S. Br. 17-18 & n.6. The majority view is correct.

1. A proximate-cause standard serves two purposes in Section 2259. U.S. Br. 33. First, it prevents restitution for remote losses, such as those incurred in a car accident on the way to a therapist's office. Amy concedes—as did the Fifth Circuit (J.A. 385 n.12)—that "Congress did not intend to cover" such losses. Amy Br. 45. But costs incurred for "medical services" are an enumerated loss, 18 U.S.C. 2259(b)(3)(A), and neither Amy nor the court of appeals explains why such losses would not be covered absent a proximate-cause limitation.

Second, a proximate-cause requirement prevents remote victims (like a child victim's future employer) from obtaining restitution. Amy does not dispute that Congress would not have intended restitution for such victims under Section 2259. Instead, she notes (Br. 40 n.14) that "corporate employers" are not eligible for restitution because Section 2259 applies only to "individuals." And she observes (Br. 41 n.15) that "remote" victims whose losses fall within "Subsection F's 'any other' category" would still "have to prove proximate causation." But without a proximate-cause requirement, an *individual* "victim" (like a child victim's individual employer, or spouse, or friend) can seek restitution under Amy's approach for *enumerated* losses (like lost income, or medical expenses, or attorneys' fees). Amy does not explain why Congress would enact a statute that provides restitution to such remote victims.

2. Amy does not address the causal language in the restitution statute's text that this Court has long understood to incorporate proximate-cause principles. See U.S. Br. 29-31. Instead, Amy focuses (Br. 18-20, 22-28) on the inclusion of the phrase "proximate re-

sult" in Section 2259(b)(3)(F). She argues (Br. 20) that such "restrictive language" cannot be "read back" to limit "Section 2259(b)(1)." But even if that were so, it would not negate proximate-cause limitations inherent in other relevant provisions, such as Section 2259(c) (defining "victim" as an "individual harmed as a result of" the offense) and 3664(e) (government's burden is to show victim's loss "as a result of the offense"), that use phrases traditionally importing proximate cause. U.S. Br. 29-31.

In any event, the proximate-cause reference in Subparagraph (F) is not limited to that subparagraph. Amy contends (Br. 24-26) that "[r]eading the postpositive modifier through each of the six [subparagraphs]" would make the statute "awkward[] and ungrammatical[]." To demonstrate that, Amy simply takes the entire phrase "suffered by the victim as a proximate result of the offense" and places it in each subparagraph. But the right way to understand the text is to recognize that its introductory phrase—"any costs incurred by the victim"—also applies to each subparagraph. Properly understood, the statute thus covers "*any costs incurred by the victim for* medical services relating to physical, psychiatric, or psychological care *as a proximate result of the offense*," "*any costs incurred by the victim for* physical and occupational therapy or rehabilitation *as a proximate result of the offense*," and so forth. See 18 U.S.C. 2259(b)(3). That construction contains no "glaring" or "jarring" "incongruity." Amy Br. 25-26.[1]

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[1] Amy is also wrong to suggest (Br. 20) that Subparagraph (F) is grammatically "separate" from the remainder of Section 2259(b)(3). The introductory language applies to each of the subparagraphs that follow, including (F). Congress did not suddenly

3. Amy argues (Br. 14-15, 28-32) that other restitution statutes reveal that Congress made a "conscious decision" to "depart from" the background "tradition" of "proximate cause." Br. 31-32 (quoting J.A. 390). Her sources support no such conclusion.

a. Amy first compares (Br. 28-30) Section 2259 to 18 U.S.C. 2327, the restitution statute for victims of telemarketing fraud. The telemarketing fraud statute provides that the "full amount of the victim's losses" are "all losses suffered by the victim as a proximate result of the offense." 18 U.S.C. 2327(b)(3). Amy argues (Br. 28, 29) that Congress could have adopted the same proximate-cause requirement in Section 2259. But Section 2259(b)(3)(F) *does* explicitly provide that "the term 'full amount of the victim's losses' includes any costs incurred by the victim for * * * any other losses suffered by the victim as a proximate result of the offense." The only difference is that Section 2259 also enumerates *specific* losses, while Section 2327 does not. But "[t]he express inclusion of costs like medical expenses and attorneys' fees indicates Congress's understanding that such losses were * * * foreseeable consequences of" Chapter 110 offenses. *United States* v. *Gamble*, 709 F.3d 541, 549 (6th Cir. 2013). Congress's delineation of specific categories of losses did not disavow a proximate-cause requirement for such losses.[2]

"shift[] gears" (*ibid.*); it simply added a catchall category for "other losses" (not previously enumerated) that were also incurred "as a proximate result of the offense."

[2] Amy's explanation (Br. 26-27, 44-45) why a "proximate result" qualifier was needed for Subparagraph (F), but not for the other subparagraphs, similarly fails. "[A]ny other losses" is intrinsically "more expansive" than the enumerated losses, Amy Br. 26, and

b. Amy next notes (Br. 14-15 & n.4, 29-30) that the general restitution statutes define "victim" as an individual "directly and proximately harmed as a result" of the commission of a particular offense, whereas Section 2259 (and other specific restitution statutes) omit the "directly and proximately" language. Compare 18 U.S.C. 1593(c), 2248(c), 2259(c), and 2264(c), with 18 U.S.C. 3663(a)(2), 3663A(a)(2); see also 18 U.S.C. 2327(c) (incorporating the definition of victim in 18 U.S.C. 3663A(a)(2)). As the government has explained (Br. 35 n.14), the Crime Victims' Rights Act (CVRA) also defines a "crime victim" as "a person directly and proximately harmed as a result of the commission" of a federal offense. 18 U.S.C. 3771(e). Thus, in Amy's view, the definition of "crime victim" in the CVRA is "narrow[er]" (Br. 14) than the definition of "victim" in Section 2259 and other specific restitution statutes. Accordingly, on her view, some "victims" would not qualify for rights under the CVRA. Amy provides no reason why Congress would have intended that incongruous result.

In any event, when Congress enacted Section 2259 in 1994, *no* restitution statute defined "victim" as a person "directly and proximately" harmed as a result of the commission of an offense. Consistent with this Court's case law, the term-of-art phrase "as a result of" was more than sufficient to import basic principles of proximate cause. U.S. Br. 29-31. The "directly and proximately" language first appeared two years later when Congress enacted Section 3663A and amended

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some will not be a proximate result of the offense. But that does not mean that Congress intended a victim's every medical expense, child-care cost, or legal fee to be eligible for restitution—however far removed from the offense of conviction. U.S. Br. 32.

Section 3663. Mandatory Victims Restitution Act of 1996 (MVRA), Pub. L. No. 104-132, §§ 204(a), 205(a), 110 Stat. 1227-1228, 1229-1230. Amy's contention thus rests on the (faulty) premise that the subsequent adoption of a different definition of "victim" in other restitution statutes, and a failure to correspondingly amend the definition of "victim" in Section 2259, *broadened* the scope of Section 2259. Although Congress made "conforming amendments" to Section 2259 in the MVRA (Amy Br. 14), it made "[n]o change * * * to the scope of restitution required under" that statute (Amy Br. 15 (quoting S. Rep. No. 179, 104th Cong., 1st Sess. 14 (1996)).[3]

4. Finally, Amy suggests (Br. 8, 35-37) that construing Section 2259 to dispense with ordinary proximate-cause limitations would be "consistent" with the traditionally more liberal causation principles applied to intentional torts. U.S. Br. 29 n.12. But Amy asks this Court to dispose of *any* proximate-cause requirement (with the exception of the catchall category of losses). Nothing in "conventional tort law" supports such a categorical approach, as Amy's own sources attest. Br. 35-36 (citing sources sup-

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[3] Amy also points to (Br. 29-30) the telemarketing fraud restitution statute, which now incorporates the definition of "victim" from Section 3663A(a)(2), but that cross-reference was added in 1998. See Telemarketing Fraud Prevention Act of 1998, Pub. L. No. 105-184, § 5(2), 112 Stat. 520. And her reliance (Br. 30-32) on a bill introduced in the Senate in 1990 to provide restitution for victims of sexual assault and domestic violence sheds no light on the meaning of the later-enacted Section 2259 for victims of child-pornography offenses.

porting "liability for a broader range of harms," not unlimited liability) (citation omitted).[4]

5. Amy and the government agree that proximate cause poses no barrier to restitution here.[5] The real question is whether, having concluded that factual and

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[4] Amy's reliance (Br. 38-39) on this Court's decision in *CSX Transportation, Inc.* v. *McBride*, 131 S. Ct. 2630 (2011), similarly overreads that decision. U.S. Br. 30 n.13. *McBride* concluded that Congress had adopted a more relaxed "test for proximate causation applicable in [Federal Employers' Liability Act] suits," but had not "eliminated the *concept* of proximate cause" altogether. 131 S. Ct. at 2641 (citation omitted); see *Norfolk S. Ry.* v. *Sorrell*, 549 U.S. 158, 178 (2007) (Ginsburg, J., concurring in the judgment).

[5] The Dutch National Rapporteur on Trafficking in Human Beings and Sexual Violence contends (Amicus Br. 6-12) that applying proximate-cause principles to Section 2259 would violate the United States' obligations under the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (Optional Protocol), *adopted* May 25, 2000, T.I.A.S. No. 13,095. See also ECPAT Int'l Amicus Br. 33-38. That is incorrect. The Optional Protocol requires member States to "take all feasible measures" to ensure "all appropriate assistance to victims" and to "ensure that all child victims" of child-pornography offenses "have access to adequate procedures to seek * * * compensation for damages from those legally responsible." Optional Protocol, art. 9. The government's position on proximate cause ensures that child victims receive compensation "from those legally responsible," and is entirely consistent with the United States' obligations under that Protocol. And, as the reports submitted by the United States on implementation of the Protocol make clear, child victims may seek compensation through means other than restitution under Section 2259. See, *e.g.*, Department of State, *Periodic Report of the United States of America to the United Nations Committee on the Rights of the Child* 93-94, www.state.gov/documents/organization/136023.pdf (Jan. 22, 2010) (citing 18 U.S.C. 2255, which provides child-exploitation victims a civil cause of action for damages).

proximate causation exist, a court must impose all of Amy's aggregate losses on each defendant. On that issue, Amy and the government take different views.

C. Joint And Several Liability For All Of The Victim's Aggregate Losses Is Not Appropriate Here

Amy argues (Br. 13) that a district court is required to award her the entire amount of her aggregate losses from each individual defendant convicted of possessing a single image depicting her sexual abuse. She contends (Br. 8, 46-47) that the award should be joint and several with other defendants convicted at other times in other cases. Neither the statute nor tort principles require that approach, and several factors unique to this criminal restitution statute counsel against it.

1. The Fifth Circuit found support for joint and several liability in 18 U.S.C. 3664(h), which permits a court to "make each defendant liable for payment of the full amount of restitution" if "the court finds that more than [one] defendant has contributed to the loss of a victim." See J.A. 467-470. Amy now concedes (Br. 49-50) that the court of appeals' reliance was misplaced and that no statute mandates or expressly authorizes joint and several liability. As the government previously explained (Br. 43-44), that concession is sound.[6]

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[6] Amy seemingly endorses (Br. 48-49) the Fifth Circuit's reliance on 18 U.S.C. 3664(m), but Section 3664(m) provides that "the United States"—not a "district court"—may enforce an "order of restitution" "by all other available or reasonable means." 18 U.S.C. 3664(m)(1)(A). Because a restitution order must be entered before the United States has anything to "enforce[]," Section 3664(m) says nothing about the district court's authority to order restitution for the entire amount of Amy's aggregate losses.

2. Amy instead relies on tort law. Br. 8, 51-59. But, contrary to Amy's assertion (Br. 53-54), joint and several liability is not now and has never been the norm in all tort cases. Courts have generally imposed joint and several liability in four categories of cases—those involving: (1) concert of action or a common plan; (2) a common duty; (3) vicarious liability; or (4) "a single indivisible harm * * * sustained as a result of the independent, separate, but concurring tortious acts of two or more persons." 1 Fowler V. Harper & Fleming James, Jr., *The Law of Torts* § 10.1, pp. 692-693 (1956) (Harper & James) (footnote omitted); see 4 Restatement (Second) of Torts §§ 875-879 (1979) (Second Restatement); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 52, pp. 346-348 (5th ed. 1984) (*Prosser & Keeton*).[7] Amy does not argue that a common duty exists here. Nor does she suggest any basis for vicarious liability. Instead, she attempts to fit within the first (concerted action) and fourth (indivisible injury) categories—and suggests a fifth for "intentional torts." But no "concert of action" exists here; intentional torts do not automatically result in joint and several liability; and the harm alleged is not "indivisible" in the relevant sense. Accordingly, ordinary tort principles do not support (let alone compel) engrafting joint and several liability onto Section 2259.

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[7] The "tort reform" movement to which Amy refers (Br. 53) aims to narrow these categories further, such that some "indivisible" injuries would be subject to apportionment. See Restatement (Third) of Torts: Apportionment of Liability § 17 cmt. a (2000); cf. *Norfolk & W. Ry.* v. *Ayers*, 538 U.S. 135, 164-165 (2003) (discussing "modern trend").

a. Amy first contends (Br. 55-56) that petitioner should be held jointly and severally liable for all of her aggregate losses because he "has joined a de facto joint criminal enterprise which connects child pornography producers, distributors, and possessors." Certainly, petitioner participated in the vast marketplace for child pornography and such participation drives demand for the creation of child pornography. Amy Br. 10-13. But Amy's repeated use of the "de facto" qualifier (Br. 12, 13, 16 n.5, 55) is telling. Participating in an illegal marketplace is insufficient to create a joint enterprise. Petitioner had no contact, and formed no plan, with the vast bulk of other offenders. Nor is this a case in which, despite the lack of a "prearranged plan," "one person acts to produce injury with full knowledge that others are acting in a similar manner and that his conduct will contribute to produce a single harm," thus creating a "joint tort." Amy Br. 56 (quoting 1 Harper & James § 10.1, p. 699). The relatively sparse authority for this view generally involves coordinated activity or incitement of others—which is not at issue here. See 1 Harper & James § 10.1, p. 699 n.42 (citing, *inter alia*, *Sourbier* v. *Brown*, 123 N.E. 802 (Ind. 1919) (author of libelous letter acted in concert with publisher of letter); *Hilmes* v. *Stroebel*, 17 N.W. 539 (Wis. 1883) (co-defendants encouraged and incited assault)). Petitioner is not legally responsible for the possession and distribution activity of the entire pool of unknown others (past, present, and future) with whom he did not coordinate and whom he did not incite.

The examples of joint and several liability on which Amy relies (Br. 54-55) are therefore inapt. When "several ruffians set upon a man and beat him, each

inflicting separate wounds," they are "intentional[ly] aiding or abetting * * * a wrong" and "coming [together] to do an unlawful act." 2 Harper & James § 20.3, p. 1124 (citation omitted; second brackets in original). The same is true of Amy's "gang rape" hypothetical. Br. 55. The defendants there would be jointly and severally liable for the victim's injuries because they joined together to accomplish a shared goal. That is not the case here.

b. Amy next asserts (Br. 8, 53-54) that, for "intentional torts," the common law "imposed broad joint and several liability." But that approach flowed from the more basic principle that imposed joint and several liability on tortfeasers for "any indivisible injury legally caused by the tortious conduct." Restatement (Third) of Torts: Apportionment of Liability § 12 & cmt. c (2000) (Third Restatement). Thus, an intentional act is not enough. For joint and several liability, the injury must still be "indivisible" and "legally caused" by the defendant's tortious conduct.[8]

c. Amy's reliance on tort law thus rests on whether her losses are "indivisible" and the extent to which they were "legally caused" by petitioner's conduct. Properly understood, Amy's losses are not "indivisible," petitioner did not legally cause *all* of her losses, and joint and several liability is not appropriate, let alone required.

i. An "indivisible" loss has a specialized meaning in tort law. Many harms are "indivisible" because they are not "even theoretically divisible," such as

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[8] The sources Amy cites (Br. 53-54) stand only for the proposition that the modern movement away from joint and several liability for indivisible injuries has excepted intentional-tort claims. See, *e.g.*, Third Restatement § 17; note 7, *supra*.

"death," a "broken leg," "the destruction of a house by fire, or the sinking of a barge." 1 Harper & James § 10.1, p. 701; *Prosser & Keeton* § 52, p. 347; see Amy Br. 61 (discussing the "well-known two fires example"); Nat'l Crime Victim Law Inst. Amicus Br. (NCVLI Amicus Br.) 15-16 (citing cases). In those cases, courts "almost uniformly * * * permit entire recovery from any or all defendants." 1 Harper & James § 10.1, p. 702; see *Prosser & Keeton* § 52, p. 347.

Other harms are "theoretically" divisible, even though it is "hard or even impossible on the facts practically available to tell just how much of the harm each of the[] causes brought about." 1 Harper & James § 10.1, p. 702; 2 Harper & James § 20.3, p. 1123; see *Prosser & Keeton* § 52, pp. 348-349. Common examples include the pollution of a stream by several factories, separate repetitions of the same defamatory statement, and "dogs which together kill sheep." *Ibid.*; see 1 Harper & James § 10.1, p. 704; 2 Second Restatement § 433A cmt. d (1963 & 1964). In those cases, the courts are "conflict[ed]," but the "prevailing rule" is that each defendant "is liable" for the part of the injury he caused. 2 Harper & James § 20.3, p. 1125; 1 Harper & James § 10.1, p. 702; see *Prosser & Keeton* § 52, pp. 348-349.

ii. Determining whether a loss is "indivisible" (and thus subject to joint and several liability) is also influenced by the theory of factual causation at issue. See Third Restatement § 26, Reporters' Note cmts. f, g. The propriety of holding a defendant liable for the plaintiff's entire injury can thus depend on whether he caused "the entire damage," "none of the damage," or "some but not all of the damage." 1 Harper & James

§ 10.1, p. 702. Here, petitioner caused "some but not all of the damage." He therefore stands in a different position from a defendant who caused the entire loss or whose actions were necessary to cause all of the loss.

"Joint and several liability has been readily imposed on independent concurring tort-feasors where the act of either alone would have caused the entire damage." 1 Harper & James § 10.1, p. 702. In such cases, the defendant's actions are an "independently sufficient" cause of the plaintiff's entire harm. U.S. Br. 21 (emphasis omitted); see *Prosser & Keeton* § 52, p. 347 (appropriate to impose "entire liability" when "either cause would have been sufficient in itself to bring about the result"); cf. NCVLI Amicus Br. 13-14 (citing cases that require, as a prerequisite to joint and several liability, that the defendant's act be a "substantial factor" in causing the loss). Similarly, if "none of the damage" would have occurred "but for" the defendant's conduct, courts have also generally imposed joint and several liability. 1 Harper & James § 10.1, pp. 702, 705-706; see *Prosser & Keeton* § 52, pp. 347-348 (appropriate to impose "entire liability" when both causes are "essential to the injury"). In those circumstances, it makes sense to require the defendant to pay for the plaintiff's entire harm.

The same is not true when the "acts of a single tort-feasor alone would have been sufficient to cause * * * some but not all of the damage." 1 Harper & James § 10.1, p. 702. In those cases, courts apportion damages (rather than impose liability on one defendant for the aggregate harm) whenever "reasonably possible." *Id.* at 707; see *Burlington N. & Santa Fe Ry.* v. *United States*, 556 U.S. 599, 614 (2009) (*Bur-*

lington Northern) ("[A]pportionment is proper when 'there is a reasonable basis for determining the contribution of each cause to a single harm.'") (quoting 2 Second Restatement § 433A(1)(b)). That is so even when "the harm inflicted by the separate torts has been almost incapable of any definite and satisfactory proof, and has been left merely to the jury's estimate." *Prosser & Keeton* § 52, p. 348. "The difficulty of any complete and exact proof in assessing * * * separate damages has been noted frequently in these cases, but it has not been regarded as sufficient justification for entire liability. *The emphasis is placed upon the possibility of reasonable apportionment.*" *Id.* at 350 (emphasis added). Courts "quite reasonably have been very liberal in permitting the jury to award damages where the uncertainty as to their extent arises from the nature of the wrong itself, for which the defendant, and not the plaintiff, is responsible." *Ibid.* And courts have devised a number of "techniques" to address difficulties of proof. 2 Harper & James § 20.3, pp. 1128-1131; see Third Restatement § 26, Reporters' Note cmt. h. In short, courts have balanced the interests of plaintiffs and defendants and "attempt[ed] some rough division"—rather than "hold one defendant liable for the entire harm, including damage inflicted solely by" others. *Prosser & Keeton* § 52, pp. 345, 348.

iii. The harm suffered by Amy is at least theoretically divisible and petitioner caused some, but not all, of Amy's harm. Her "financial losses" would *not* "remain the same" if petitioner had been the only person to view her images. Amy Br. 63. Indeed, "it is beyond implausible" that Amy "would have suffered the harm [she] did had [petitioner] been the only person in the

world to view pornographic images of [her]." *United States* v. *Laraneta*, 700 F.3d 983, 991 (7th Cir. 2012), cert. denied, 134 S. Ct. 235 (2013). That makes this case fundamentally different than the two fires that concurrently destroy a house. If only one fire had been set, the house still would have been destroyed. If petitioner had been the only possessor of Amy's images, she still would have been injured—but not as much. See J.A. 59-66, 81-86. Traditional tort-law principles do not support imposition of joint and several liability in these circumstances.

That is especially true in the unique circumstances presented here. This is not a case involving two or three or even a dozen tortfeasors. Potentially thousands of actors (past, present, and future) have engaged or will engage in intentional and criminal conduct that caused and will continue to cause harm to Amy. The difference between Amy's aggregate losses and an individual defendant's relative contribution to those losses is therefore quite stark. In those circumstances, a rule of joint and several liability—holding each defendant liable for all of her losses—would be "disproportionate." 2 Second Restatement § 433B(2) cmt. e; cf. *ibid.* ("[I]f a hundred factories each contribute a small, but still uncertain, amount of pollution to a stream, to hold each of them liable for the entire damage because he cannot show the amount of his contribution may perhaps be unjust.").

3. Amy suggests two ways in which any disproportionate liability could be mitigated. Neither withstands scrutiny.

First, Amy asserts (Br. 57) that "an unhappy wealthy criminal can always seek contribution from other solvent offenders." For the reasons set forth in the

government's opening brief (at 45-46), that is incorrect. Contribution is an independent claim and requires a separate cause of action. Amy does not identify any statute granting convicted sex offenders a federal cause of action to seek contribution from other convicted sex offenders. Amy suggests (Br. 58) that a federal court could imply such a private right of action from Section 2259, but she makes no attempt to square that assertion with this Court's implied-right-of-action jurisprudence. See, *e.g.*, *Alexander* v. *Sandoval*, 532 U.S. 275, 286-287 (2001). Section 2259, for one, is "expressly directed against" defendants, not enacted for their benefit. See *Northwest Airlines, Inc.* v. *Transport Workers Union of Am.*, 451 U.S. 77, 92 (1981). Amy alternatively suggests (Br. 57-58) that joint and several liability would nonetheless be appropriate because the common law did not allow intentional tortfeasors to pursue contribution. Accordingly, an "unhappy wealthy criminal" convicted of possessing even a single image of child pornography will have to pay millions of dollars in restitution to cover all of a victim's losses, even though those losses were caused in large part by a myriad of others—while those other defendants pay nothing. That does not seem proportionate.

Second, Amy contends (Br. 41-42) that "no defendant will be required to pay more than" what is "reasonable" because "the majority of child pornography defendants" are "indigent" and the district court can establish a payment schedule based on the defendant's ability to pay. A defendant of course will not have to pay restitution with money he does not have. But if a defendant has financial resources or later gets himself back on his feet, he will have to pay Amy any portion

of the approximately $3 million restitution award that remains outstanding. Accordingly, a payment schedule can mitigate enormous restitution orders only to the extent a defendant is indigent and remains so.

That highlights a significant flaw in Amy's approach: it allows victims to recover restitution from a handful of "wealthy" defendants and absolves hundreds of equally culpable defendants from their statutory obligation to pay restitution. The primary goal of restitution is to compensate victims for their losses. But Section 2259 is part of a criminal statute and restitution is imposed as part of a criminal sentence. See *Pasquantino* v. *United States*, 544 U.S. 349, 365 (2005). The ultimate goals of drying up the child-pornography market and discouraging individuals from participating in that market are served by requiring individuals (like petitioner) to pay restitution to victims (like Amy). Restitution awards tell "mere" possessors that their crimes cause concrete harms to real, identifiable children. A regime of joint and several liability that results in a handful of wealthy defendants paying virtually all of the restitution, while most other offenders pay virtually none, defeats that purpose.

D. Restitution Can Reasonably Be Apportioned In The Exercise Of The District Court's Sound Discretion

This Court need not choose between holding one defendant liable for all aggregate losses caused by hundreds of criminals (as Amy would do) or turning away a victim who has indisputably suffered losses as a result of the collective actions of many criminals (as petitioner would do). Instead, the district court should have discretion to apportion a victim's aggregate losses in a reasonable manner. Apportionment is

a fair way to provide full restitution to victims, to distribute responsibility among the group of defendants who collectively caused the victim's losses, and to ensure that an individual defendant is not held responsible for losses he could not possibly have caused.

1. Amy contends (Br. 64-65) that this Court should reject apportionment because the government "cannot devise a reasonable basis for apportionment."[9] Amy appears to misunderstand the government's position. The government is not advocating a "market share" approach. There would be no litigation "about the size" of the child-pornography market. Amy Br. 64-65. And petitioner's restitution obligation would not be reduced to "$47" based on his "market share." Amy Br. 65.

Courts have relied on a variety of methods to achieve reasonable apportionment, rather than reflexively impose joint and several liability. See 2 Harper & James § 20.3, pp. 1128-1131; Third Restatement § 26, Reporters' Note cmt. h; see also *Burlington Northern*, 556 U.S. at 615-619 (reversing court of appeals' imposition of joint and several liability and reinstating district court's reasonable apportionment). They have "steer[ed] a careful course between the Scylla of denying the plaintiff any remedy and the Charybdis of imposing on one defendant all the dam-

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[9] Amy briefly suggests (Br. 50) that Section 3664(h) forbids a court from apportioning a restitution award among defendants in different cases. That suggestion cannot be reconciled with her assertion (*ibid.*) that Section 3664(h) does not "forbid[] joint and several liability in similar circumstances. Amy does not explain how the same provision could be silent about the availability of joint and several liability where "multiple defendants [are] sentenced before different courts at different times" (Br. 49-50), but expressly forbid apportionment in those same circumstances.

ages, at least some of which [were not legally caused by the defendant]." Third Restatement § 26, Reporters' Note cmt. h (citation omitted).

2. The government has set forth a reasonable basis for apportioning a victim's losses among defendants convicted of Chapter 110 offenses. U.S. Br. 49. As Judge Kethledge has explained, to apportion losses, courts should consider a number of factors including the number of criminal defendants who contributed to the victim's harm; "whether the defendant produced or distributed images of the victim; how many images the defendant possessed; and any other fact relevant to measuring the defendant's culpability relative to the other relevant actors." *Gamble*, 709 F.3d at 557 (Kethledge, J., concurring in part and concurring in the judgment). Courts may apply a reasonable formula to arrive at a starting point for further analysis. See, *e.g.*, *United States* v. *Lundquist*, 731 F.3d 124, 138-141 (2d Cir. 2013); *United States* v. *Hargrove*, 714 F.3d 371, 375-376 (6th Cir. 2013); *United States* v. *Benoit*, 713 F.3d 1, 22 n.8 (10th Cir. 2013). And they may look to restitution orders issued in other similar cases. See, *e.g.*, *United States* v. *Kearney*, 672 F.3d 81, 100-101 (1st Cir. 2012), cert. dismissed, 133 S. Ct. 1521 (2013).

These determinations will be subject to appeal. 18 U.S.C. 3742. And, as in other contexts in which reasonableness determinations turn on recurring but fact-sensitive questions, "appellate review [will] tend to iron out sentencing differences," *United States* v. *Booker*, 543 U.S. 220, 263 (2005), fostering generally consistent approaches and results and overturning unreasonable ones.

That approach is not unsound simply because it considers multiple factors on particular records. The common law asked only for "some rough practical apportionment" of damages relative to the harm for which the *defendant* was a cause in fact. *Prosser & Keeton* § 52, p. 345. That is consistent with the criminal law principle that a court ordering restitution need only make a reasonable estimate of loss. U.S. Br. 41, 48.

And it would not result in "trivial" restitution for Amy or other child victims. Amy Br. 65. One of the factors courts must consider in determining an appropriate restitution amount is the statutory purpose of affording a victim full restitution for all of her losses. See also 18 U.S.C. 3553(a)(7) (requiring sentencing courts to consider "the need to provide restitution to any victims of the offense"). Although Amy is harmed by offenders who have not been apprehended (Amy Br. 65), a district court should not diminish restitution by focusing on defendants who may never be held liable for it.

3. Every court of appeals (except the Fifth Circuit) to have considered the issue has adopted an apportionment approach that affords district courts sufficient flexibility to arrive at a reasonable restitution award. See, *e.g.*, *Lundquist*, 731 F.3d at 138-141; *Hargrove*, 714 F.3d at 375-376; *Benoit*, 713 F.3d at 22 n.8; *Kearney*, 672 F.3d at 100-101. And district courts, when ordering restitution, have generally awarded a reasonably estimated portion of the aggregate amount of losses. See, *e.g.*, *United States* v. *Cantrelle*, No. 2:11-cr-00542, 2013 WL 1624824, at *4-*10 (E.D. Cal. Apr. 15, 2013); *United States* v. *Brunner*, No. 5:08-cr-00016, 2010 WL 148433, at *3-*5

(W.D.N.C. Jan. 12, 2010). In the relatively short time that such awards have been issued, the courts have not settled on a single approach. See Nat'l Crime Victim Bar Ass'n Amicus Br. 26-31. But that has not led to wholly disparate or unreasonable awards. To the contrary, the vast majority of district court orders awarding Amy restitution have been in the range of $1000 to $50,000.[10] A system that affords district courts the discretion to impose reasonable restitution awards based on common factors should—with time, experience, and appellate review—produce similar and fair results in comparable cases.

* * * * *

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

DECEMBER 2013

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[10] Amy suggests (Br. 48) that the Department of Justice (DOJ) has a "database" that monitors restitution awards. More precisely, DOJ maintains a spreadsheet of orders awarding restitution under Section 2259 based on information provided by United States Attorneys' Offices. Although DOJ endeavors to make the spreadsheet comprehensive, it lacks any automated process for tracking restitution awards and relies instead on case-by-case reporting from prosecutors. Based on that information, to the best of DOJ's knowledge, approximately 85% of Amy's restitution awards (that is, 155 out of 182 awards) have been in the range of $1000 to $50,000. The average award in that range is approximately $5400. Those numbers include awards negotiated pursuant to plea agreements, and it includes orders in possession, receipt, distribution, advertising, and transportation cases. By separate letter, the government is offering to lodge a printout of this spreadsheet with the Clerk of the Court. See Sup. Ct. R. 32.3.

RESPONDENT'S BRIEF

No. 12-8561

FILED
APR 24 2013

In The

Supreme Court of the United States

DOYLE RANDALL PAROLINE,

Petitioner,

vs.

AMY UNKNOWN and UNITED STATES,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONSE TO A PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Congress enacted the Mandatory Restitution for Sexual Exploitation of Children Act of 1994, 18 U.S.C. §2259, to benefit victims of federal child pornography crimes, including victims like respondent-Amicus Amy, whose child sex abuse images are traded and collected over the internet by countless individuals worldwide. The statute provides in part that a court "shall order restitution" for a victim of any child pornography crime in "the full amount of the victim's losses." Congress defined these losses as including psychological counseling, lost income, attorneys' fees, child care expenses, as well as "any other losses suffered by the victim as a proximate result of the offense." The question presented is whether the Mandatory Restitution for Sexual Exploitation of Children Statute, 18 U.S.C. §2259, excuses a defendant from paying restitution for the enumerated loss categories unless there is proof that the victim's losses were the proximate result of an individual defendant's child pornography crime.

2. The Excessive Fines Clause of the Eighth Amendment provides that "excessive fines [shall not be] imposed." U.S. Const., Amdt. VIII. This Court has applied the Excessive Fines Clause in *United States v. Bajakajian*, holding that "[f]orfeitures – payments in kind – are . . . 'fines' if they constitute punishment for an offense." 524 U.S. 321, 328 (1998). In applying *Bajakajian* to crime victim restitution, the United

QUESTIONS PRESENTED – Continued

States Courts of Appeals are divided on whether restitution awards are similarly punishment for an offense and thus subject to the limitations of the Excessive Fines Clause. The second question presented is whether a district order directing a defendant to make restitution payments to the victim of his crime is punishment subject to the limitations of the Excessive Fines Clause, or is a remedial payment not restricted by the Clause.

LIST OF PARTIES

These petitions involve two criminal prosecutions brought by the United States for child pornography crimes committed by Doyle Randall Paroline and Michael Wright. "Amy" (who proceeds here by pseudonym) is a victim of these crimes.

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OPINIONS BELOW

Petitioners Doyle Randall Paroline and Michael Wright have both filed separate petitions for writs of certiorari seeking review of a reported, en banc opinion of the United States Court of Appeals for the Fifth Circuit. 701 F.3d 749 (5th Cir. en banc 2012), reprinted in Paroline App. 1-54.[1] The Fifth Circuit's en banc decision covers two cases which were consolidated for purposes of argument and decision. 668 F.3d 776. The first of these two cases is *In re Unknown*, 636 F.3d 190 (5th Cir. 2011), which granted mandamus on rehearing from *In re Amy*, 591 F.3d 792 (5th Cir. 2009), which in turn affirmed the district court's decision in *United States v. Paroline*, 672 F.Supp.2d 781 (E.D. Tex. 2009). The second of these two cases is *United States v. Wright*, 668 F.3d 776 (5th Cir. 2012), which affirmed an unreported district court decision.

"Amy"[2] was the successful mandamus petitioner in the first of these two cases and is thus a respondent to Paroline's petition. Amy was a successful amicus participant in the second of these two cases and is thus not a respondent to Wright's petition. She files in response to Paroline's petition.[3] The two

---

[1] This decision superseded 697 F.3d 306 (5th Cir. en banc), by correcting an issue about the scope of the remand with regard to petitioner Wright.

[2] As she did in the courts below, Amy proceeds by way of a pseudonym because she is the victim of child sexual abuse.

[3] Because Amy's response supports Paroline's petition in part, Amy and the Government have agreed to a briefing

(Continued on following page)

cases have been vided and will be decided at the same time, so Amy also discusses the Wright petition here.

STATEMENT

Respondent Amy was exploited as a young girl in order to produce child sex abuse images. The resulting images are among the most widely-disseminated child pornography series in the world. Amy requires lifetime psychological counseling. She dropped out of college and finds it difficult to engage in full-time employment because she fears encountering individuals who may have seen the images of her sexual exploitation. She has suffered serious financial losses because of child pornography crimes.

Congress passed a broad restitution statute for child pornography victims like Amy. The Mandatory Restitution for Sexual Exploitation of Children Act of 1994, 18 U.S.C. §2259, requires that when sentencing a defendant for a child pornography crime, the district court must direct the defendant to pay the victim the "full amount of the victim's losses." The statute defines losses as including expenses for psychological counseling, lost income, child care expenses, and attorneys' fees. 18 U.S.C. §2259(b)(3)(A)-(E). It also authorizes restitution for "any other losses suffered

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schedule in which Amy will file her response in advance of the Government.

by the victim as a *proximate result* of the offense." 18 U.S.C. §2259(b)(3)(F) (emphasis added).

A deep, acknowledged circuit split has developed on how to interpret this commonly-used restitution statute. In the last three years, eleven circuits have ruled on this recurring issue. Applying varying rationales, ten circuits have interpreted the "proximate result" limitation as implicitly applying not only to the last item in the list (the "any other losses") but also to all the other enumerated losses. Under this interpretation of the statute, in order to obtain restitution for the cost (for example) of psychological counseling, Amy and other victims must show that the counseling was the "proximate result" of an individual defendant's crime. As a practical matter, this showing is quite difficult to make given that thousands of defendants are currently being prosecuted for possessing, transporting, and distributing Amy's child sex abuse images with thousands of more to come in the foreseeable future.

In the decision below, however, the Fifth Circuit en banc reached a different interpretation of the statute. Specifically rejecting the view of the other circuits, the Fifth Circuit held, 10 to 5, that Congress intended to provide broad restitution to victims of federal child sex offenses without requiring proof that losses proximately resulted from an individual defendant's crime. This lengthy and well-reasoned decision is faithful to the text of the statute, which contains a proximate result requirement only in subsection (F) and not in subsections (A) through (E).

The Fifth Circuit also held that this interpretation does not implicate Eighth Amendment excessive punishment concerns since restitution is not punishment but a remedial measure to compensate crime victims.

Two petitions challenging the Fifth Circuit's ruling were filed, one by each of the two defendants in the two cases. Petitioner Paroline's petition is an ideal vehicle for reviewing this issue because of its well-developed record and truly adversarial posture. To resolve the circuit split, this Court should grant his petition and affirm the Fifth Circuit's well-reasoned en banc decision below. In contrast, petitioner Wright's petition is not a good vehicle for resolving the circuit split. His case does not stand in an adversarial posture because the Government agrees with him on how to interpret the statute and Amy is not a party to the case. Moreover, Amy long ago withdrew her request for restitution (a fact not disclosed in Wright's petition), now rendering the case effectively moot.

STATEMENT OF THE CASE

United States v. Paroline Procedural History

1. When she was eight and nine years old, Amy was repeatedly raped and sexually exploited by her uncle in order to produce child pornography. The images of her abuse memorialize Amy being forced to endure rape, cunnilingus, fellatio, and digital

penetration as a young girl. Amy was sexually abused specifically for the purpose of producing child sex abuse images. After this initial abuse was discovered, Amy received significant psychological counseling and (as reflected in her therapist's notes) by the end of her treatment in 1999, Amy was "back to normal" and engaged in age-appropriate activities such as dance.

Sadly, Amy's condition drastically deteriorated as she realized that her child sex abuse images are widely collected and traded on the internet. As her psychologist explained in Amy's victim impact statement, the "Misty" series depicting Amy is one of the most widely-trafficked sets of child sex abuse images in the world. As a result, Amy continues to be "known, revealed and publicly shamed, rather than anonymous. . . ."

The collection and trading of Amy's child sex abuse images on the internet has caused "long lasting and life changing impact[s] on her" that "are more resistant to treatment than those that would normally follow a time limited trauma." The re-victimization Amy suffers from the continued collection and distribution of her images will last throughout her entire life. She will require weekly therapy, and it is likely there will be periods where more intensive inpatient treatment or rehabilitation services will be required.[4]

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[4] In January 2013, the *New York Times Magazine* published a cover story about the difficulties faced by Amy and other victims of child pornography. Emily Bazelon, *The Price of a*

(Continued on following page)

2. One of the criminals who joined in the collective world-wide exploitation of Amy is petitioner Paroline. On January 9, 2009, he pleaded guilty to one count of possession of material involving the sexual exploitation of children in violation of 18 U.S.C. §§2252(a)(4)(B) and 2252(b)(2). The National Center for Missing and Exploited Children (NCMEC) identified Amy as one of the children victimized in the child sex abuse images he collected.

The United States Attorney's Office notified Amy's attorney that she was a victim in the case.[5] Amy's counsel filed a detailed victim impact statement on her behalf, describing not only the harm she suffered from childhood sexual abuse, but also the harm she continues to endure from knowing that she is powerless to stop the trading of her child sex abuse images on the internet. In her request for restitution, Amy sought $3,367,854 from Paroline (primarily for future lost income and psychological counseling). This amount reflected the total amount of Amy's losses from the production, distribution and possession of child pornography.

3. On June 10, 2009, the district court sentenced Paroline to 24 months in prison and severed

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Stolen Childhood, N.Y. TIMES MAG. (Jan. 24, 2013) (*available at* http://bit.ly/stolenchildhood).

[5] Due to the widespread distribution of her images, Amy's trial attorney currently receives an average of one notification each day of a new federal criminal case involving Amy's child sex abuse images; the total federal criminal cases now exceed 1600.

the restitution issue from the other sentencing issues. Later, the Court conducted a two day restitution hearing pursuant to 18 U.S.C. §3664(d)(5). Amy's counsel presented arguments in support of her restitution request which the Government supported. An extensive record on the restitution issues was developed.

On December 7, 2009, the district court issued an opinion refusing to award Amy restitution even though restitution is "mandatory" under 18 U.S.C. §§2259(a) and (b)(4). *United States v. Paroline*, 672 F.Supp.2d 781 (E.D. Tex. 2009). The court began by making a factual finding that Amy was a "victim" of Paroline's crime because she was harmed by his crime. The district court explained "the continual online distribution and possession of the child pornography images re-victimizes these child victims, stripping them of any control over the disclosure of their abuse and exposing them to further shame and humiliation." *Id.* at 787.

The district court then concluded Section 2259 requires that all of "a victim's losses [must] be proximately caused by the defendant's conduct to be recoverable in restitution." *Id.* at 791. Although the district court recognized that a "significant" amount of Amy's losses "are attribute[able] to the widespread dissemination and availability of her images and the possession of those images by many individuals such as Paroline," it nonetheless refused to award her restitution. *Id.* at 792-93. The district court concluded that Amy could not specify which losses Paroline had

caused. *Id.* at 793. The district court admitted that its interpretation of the child pornography restitution statute rendered it "unworkable." *Id.* at 793 n.12.

4. Amy then promptly sought review of the district court's denial of her restitution request, using the appellate review provision found in the Crime Victim's Rights Act (CVRA), 18 U.S.C. §3771(d)(3). Acting rapidly, a divided panel of the Fifth Circuit declined to grant any relief, with Judge Dennis dissenting. *In re Amy*, 591 F.3d 792 (5th Cir. 2009).

Amy then sought a panel rehearing and rehearing en banc. Paroline and the Government opposed her position. On March 22, 2011, a unanimous panel of the Fifth Circuit granted Amy's petition for panel rehearing and concluded that the district court had "clearly and indisputably erred in grafting a proximate causation requirement onto the CVRA." *In re Amy*, 636 F.3d at 192. The panel explained that Congress included a "proximate" cause requirement only on a catchall category of restitution losses, not to the specific enumerated restitution losses (e.g., psychiatric counseling expenses). *Id.* at 198-99.

Both Paroline and the Government sought rehearing en banc of the panel's decision. On January 25, 2012, the Fifth Circuit granted rehearing en banc.

United States v. Wright Procedural History

1. When federal agents executed a search warrant at petitioner Wright's home, they discovered

30,000 images and videos in his possession depicting the sexual exploitation of children. The material included children less than twelve years old engaged in "sexually explicit conduct" including "adult males vaginally or anally penetrating minor victims and minors performing oral sex on adults." On June 17, 2009, Wright pleaded guilty to a one-count information for possessing images depicting the sexual abuse of children in violation of 18 U.S.C. §2252(a)(4)(B). His plea agreement included an appeal waiver provision, which he acknowledged during the plea proceedings.

The Bureau of Immigration and Customs Enforcement identified 21 known victims among Wright's 30,000 child sex abuse images, including Amy. After Amy's counsel was notified, she filed a victim impact statement and detailed restitution request outlining $3,367,854 in losses (as in the *Paroline* case). The prosecutors handling the case supported Amy's request and Wright objected.

At sentencing, the district court granted a fraction of the restitution Amy was seeking. The court awarded restitution of $529,661 based on the future projected costs of $512,681 for counseling and $16,980 for Amy's expert witness fees.

2. Wright appealed. He challenged the restitution award by arguing that he did not proximately cause any of Amy's losses. The Government responded with a brief fully defending the award and arguing that, in any event, Wright had waived his right to

appeal. The Government "assumed" that the statute generally requires proof that a defendant proximately caused a victim's losses, but contended that record evidence established the necessary proximate cause. Amy, who was not a party to the action, did not file a brief and did not participate in oral argument.

On April 20, 2011, following oral argument, a panel of the Fifth Circuit found that the appeal waiver in Wright's plea agreement did not foreclose his right to appeal the restitution order. *United States v. Wright*, 639 F.3d 679, 683 (5th Cir. 2011). The panel then reversed the district court's restitution award, concluding that the district court failed to adequately explain why it ordered Wright to pay some parts of Amy's restitution request but not others. *Id.* at 686. The three judges on the panel, however, also filed a special concurring opinion. In it, they expressed their disagreement with the panel decision in *In re Amy Unknown*, 636 F.3d 190 (5th Cir. 2011), and urged that this issue be reheard en banc. *See id.* at 686 (Davis, J., specially concurring).

3. On June 2, 2011, Wright filed a petition for rehearing en banc. The Government filed a petition for panel rehearing, referencing its support for rehearing en banc in the parallel case of *In re Amy Unknown*.

On June 3, 2011, Amy filed a letter "withdraw[ing] with prejudice the request for criminal restitution" in the case. *See* Appendix. The Government later took the position that the letter was

irrelevant to the Fifth Circuit's jurisdiction because "the district court currently lacks jurisdiction to address [Amy's] counsel's letter." Gov't Pet. for Panel Rehearing p. 8 n.4 (citing *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (district court divested of jurisdiction over a case when notice of appeal filed)); *see also* Letter from Appellant Mr. Michael Wright, Court of Appeals Docket No. 09-31215, Doc. 00511504289 (June 9, 2011) (making similar argument).

On January 25, 2012, the Fifth Circuit granted rehearing en banc in this case and the companion case of *In re Amy Unknown*. On February 22, 2012, the Court granted Amy's motion to file a brief and argue as amicus in support of the judgment below.

The En Banc Decision Below

1. On November 19, 2012 the Fifth Circuit en banc held 10 to 5 that the Mandatory Restitution for Sexual Exploitation of Children Act of 1994, 18 U.S.C. §2259, does not contain a general requirement that a child pornography victim establish that her losses were the "proximate result" of an individual defendant's crime. After finding that it had jurisdiction in both the *Paroline* and *Wright* cases,[6] the Fifth

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[6] The Fifth Circuit concluded that, while Amy could not take an appeal from the district court's decision denying restitution – she was specifically authorized by the Crime Victims Rights Act (CVRA) to seek mandamus review. Paroline App.

(Continued on following page)

Circuit turned to the plain language of the statute. The Circuit explained that Section 2259 "reflects a broad restitutionary purpose" and makes an award for the "full amount of the victim's losses" mandatory. Paroline App. 17. The plain language of Section 2259 contains a "proximate result" requirement only in the last of six separately-enumerated subsections. According to "rule of the last antecedent," a limiting phrase "should ordinarily be read as modifying only the noun or phrase it immediately follows." *Id.* at 21 (*quoting Barnhart v. Thomas*, 540 U.S. 20, 26 (2003)). The Circuit held that this approach makes sense in construing Section 2259. The statute

> begins with an introductory phrase composed of a noun and verb . . . that feeds into a list of six items, each of which are independent objects that complete the phrase. Only the last of these items contains the limiting language 'proximate result.' A double-dash opens the list, and semi-colons separate each of its elements, leaving §2259(b)(3) with a divided grammatical structure. . . .

Id. at 22-23. It would "stretch[ ] the modified too far" and "disregard the structure of §2259(b)(3) as written" to use canons of construction to apply the "proximate result" limitation outside of the subsection

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14-15. The Fifth Circuit also concluded that, while Wright specifically waived his right to appeal, it "need not further address the appeal waiver issue" since the Government was not seeking to enforce the appeal waiver during the en banc proceedings. Paroline App. 6 n.4.

where it appears. *Id.* at 26 (internal quotations omitted).

The Fifth Circuit also noted that while a number of circuits had applied the "proximate result" limitation beyond subsection (F), at least three of those circuits held that doing so was not supported by standard rules of statutory construction but by a general "proximate result" requirement inherent in the statute. *Id.* at 26 (citing decisions from the Second, Fourth, and D.C. Circuits). These circuits found ordinary rules of statutory construction were overridden by general principles of tort law.

The Fifth Circuit rejected this reasoning. "The selective inclusion and omission of causal requirements in §2259's subsections, together with language pointing away from ordinary causation, suggest that Congress intended to depart from, rather than incorporate, a tradition of generalized proximate cause." *Id.* at 31. The Fifth Circuit explained that this "joint and several liability mechanism applies well in these circumstances, where victims like Amy are harmed by [multiple] defendants acting separately who have caused her a single harm." *Id.* at 33.

2. The Fifth Circuit also rejected any suggestion that allowing Amy to recover full restitution imposed on defendants excessive punishment under the Eighth Amendment. The Circuit held that restitution is not "punishment subject to the same Eighth Amendment limits as criminal forfeiture. Its purpose is remedial, not punitive." *Id.* at 37. Moreover, any

harsh impact on a defendant can be ameliorated through an appropriate payment schedule. *Id.*

3. After rejecting the arguments of both the defendants and the Government, and resolving the statutory construction issue in Amy's favor, the Fifth Circuit turned to the remands in the two cases. In *Paroline*, the Circuit noted that the district court was obligated to award Amy restitution for "the 'full amount of [her] losses' as defined under §2259(b)(3))." Paroline App. 40. The Fifth Circuit accordingly directed that, "[o]n remand, the district court must enter a restitution order reflecting the 'full amount of [Amy's] losses' in light of our holdings today." Paroline App. 41. In *Wright*, the Fifth Circuit noted that the district court did not award Amy the full amount of her losses, but only the full amount of her losses from psychological counseling. Since only Wright appealed, the Fifth Circuit affirmed the restitution award entered by the district court. *Id.* at 41.

REASONS FOR GRANTING PAROLINE'S PETITION AND DENYING WRIGHT'S PETITION

The issue of whether Section 2259 contains a general proximate result limitation has deeply divided the circuit courts. Although a number of circuits have imposed such a proximate cause requirement onto Section 2259 for various conflicting reasons, the Fifth Circuit correctly rejected such judicial rewriting

of the statute. The practical effect of this clearly-acknowledged circuit split is that child pornography victims in the Fifth Circuit are now receiving restitution for "the full amount of their losses," 18 U.S.C. §2259(b)(1), while in many other circuits victims face what the Ninth Circuit declared are "serious obstacles" to collecting anything at all. This division represents a recurring issue of great significance, not only for the many identified victims of child pornography, but also for the several thousand criminal defendants who have mandatory restitution obligations to child pornography victims every year.

This Court should consider Paroline's petition in order to resolve the circuit split by affirming the Fifth Circuit's en banc decision. As the Fifth Circuit carefully explained, "Congress intended to afford child victims ample and generous protection and restitution, not to invite judge-made limitations patently at odds with the purpose of the legislation." Paroline App. 32 n.15. Such a requirement forces victims, defendants, prosecutors, and district courts into interminable litigation about what proportion of a victim's losses are caused by an individual defendant's criminal violation of the child pornography laws. Congress did not intend to make victims trace out their losses to each individual defendant as a precondition to eventually receiving restitution for the full amount of those losses.

This Court should also use Paroline's petition to review the second issue on which the Circuits (and state courts) are divided: whether restitution awards

are limited by the Eighth Amendment. This is also an important issue that requires clarification from the Court.[7]

The Court should not grant review of Wright's petition. The Wright petition does not stand in an adversarial posture since both Wright and the Government (the only two parties to the case) both agree that the statute contains a general proximate result requirement. The Wright petition is also effectively moot since Amy long ago withdrew her restitution request.

I. The Lower Courts Are Intractably Divided on Whether the Mandatory Restitution for Sexual Exploitation of Children Statute Imposes a General Proximate Cause Requirement.

Whether the Mandatory Restitution for Sexual Exploitation of Children Act contains a general proximate cause requirement is a recurring issue that has divided the federal courts of appeals. The statute, 18 U.S.C. §2259, requires restitution for all victims of child pornography and many other federal child sex crimes. 18 U.S.C. §3771(b)(4) ("[t]he issuance of a restitution order under this section is mandatory"). The statute broadly defines a "victim" as "the individual harmed as a result of a commission of . . . [a

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[7] If the Court grants review, Amy requests that the questions presented be reformulated to track her questions here.

federal child sex offense]." 18 U.S.C. §2259(c). The statute requires that when sentencing a defendant convicted of such an offense, the district court "shall direct the defendant to pay the victim . . . the full amount of the victim's losses. . . ." 18 U.S.C. §3771(b)(1). The statute then defines the phrase "full amount of the victim's losses" as "include[ing] any costs incurred by the victim for –

> (A) medical services relating to physical, psychiatric, or psychological care;
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> (B) physical and occupational therapy or rehabilitation;
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> (C) necessary transportation, temporary housing, and child care expenses;
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> (D) lost income;
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> (E) attorneys' fees, as well as other costs incurred; and
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> (F) any other losses suffered by the victim as a *proximate result* of the offense."

18 U.S.C. §2259(b)(3) (emphasis added). Whether the "proximate result" language applies only to the catch-all subsection (F) where it appears, or should implicitly be read backwards through subsections (A) through (E) as well, is a question producing disagreement throughout the country.

Ten circuits have held that a victim must show that all her losses were the proximate result of an individual defendant's crime in order to obtain full restitution. *See United States v. Kearney*, 672 F.3d 81,

94-95 (1st Cir. 2012); *United States v. Aumais*, 656 F.3d 147, 153 (2d Cir. 2011); *United States v. Burgess*, 684 F.3d 445, 456-57 (4th Cir. 2012); *United States v. Evers*, 669 F.3d 645, 658-59 (6th Cir. 2012); *United States v. Laraneta*, 700 F.3d 983 (7th Cir. 2012); *United States v. Fast*, 709 F.3d 712, 721-22 (8th Cir. 2013);* *United States v. Kennedy*, 643 F.3d 1251, 1260-66 (9th Cir. 2011), *petition for cert. filed*, No. 12-651; *United States v. Benoit*, ___ F.3d ___, 2013 WL 1298154 (10th Cir. Apr. 2, 2013); *United States v. McDaniel*, 631 F.3d 1204, 1208-09 (11th Cir. 2011); *United States v. Monzel*, 641 F.3d 528, 535 (D.C. Cir.), *cert. denied sub nom. Amy v. Monzel*, 132 S.Ct. 756 (2011),† *on appeal after remand*, No. 12-3093 (oral argument scheduled May 10, 2013). The Third Circuit has suggested the same conclusion, albeit in dicta. *United States v. Crandon*, 173 F.3d 122, 125-26 (3d Cir. 1999).

The Fifth Circuit below reviewed these decisions and – acting en banc – specifically rejected them. Paroline App. 41 ("we reject the approach of our sister circuits and hold that §2259 imposes no generalized proximate cause requirement"). The Fifth Circuit

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* On or about May 20, 2013, the victim in this case will file a petition for a writ of certiorari from the Eighth Circuit's divided ruling.

† The Government opposed certiorari in *Monzel*, arguing that it was "premature" to review the circuit split created by the Fifth Circuit's decision because petitions for rehearing en banc were pending. Of course, the grounds advanced by the Government in *Monzel* against certiorari have disappeared.

noted that these decisions are fractured in both their views and reasoning. In surveying the other decisions, the Fifth Circuit observed that "[a]ny 'seeming agreement on a standard [in the circuits] suggests more harmony than there is.'" *Id.* at 26 n.12 (*quoting Kearney*, 672 F.3d at 96); *accord Kennedy*, 643 F.3d at 1260 (noting that construing Section 2259 presents "[a] difficult issue of statutory interpretation [which] has been considered, but not satisfactorily resolved, by several of our sister circuits.").

Among the ten circuits holding that Section 2259 contains a general proximate result requirement, the rationales have varied widely. Two circuits based such a requirement on the principle of general statutory construction: the Ninth Circuit and the Eleventh Circuit. *See Kennedy*, 643 F.3d at 1261-62 (relying on statutory interpretation to find a general proximate cause limitation); *McDaniel*, 631 F.3d at 1208-09 (same). Four other circuits have rejected the Ninth and Eleventh Circuits' reasoning, holding instead that "traditional principles of tort and criminal law" require a general proximate cause limitation. *Monzel*, 641 F.3d at 535 ("Unlike those circuits, however, our reasoning rests not on the catch-all provision of §2259(b)(3)(F), but rather on traditional principles of tort and criminal law. . . ."); *see also Burgess*, 684 F.3d at 456-57 ("declin[ing] to adopt this line of reasoning [relying on statutory language]."); *Aumais*, 656 F.3d at 153 (recognizing competing lines of reasoning and "endors[ing] the D.C. Circuit's reasoning."); *Benoit*, 2013 WL 1298154 at *15 (agreeing with *Monzel* and

Burgess). The Sixth Circuit noted these diverging principles, but concluded "[w]e need not choose between the rationales." *Evers*, 669 F.3d at 659. The First Circuit acknowledged the disagreement, but it developed its own resolution by imposing a general proximate result requirement, while concluding that the requirement could be shown in the "aggregate" rather than at the "individual" level. *Kearney*, 672 F.3d at 98. The Eight Circuit followed the First Circuit. *Fast*, 709 F.3d at 721. And recently the Seventh Circuit added yet another variation on the theme. The Seventh Circuit held that while a proximate result requirement exists, it results in full liability (i.e., joint and several liability) for any offender who *distributes* child pornography but not an offender who *possesses* child pornography. *United States v. Laraneta*, 700 F.3d 983, 990-92 (7th Cir. 2012).

It is against this backdrop of conflicting rationales and results that the Fifth Circuit granted rehearing en banc in order to "address the discrepancy between the holdings of [it] and other circuits. . . ." Paroline App. 3. The en banc Court then explicitly rejected the other circuits' decisions, concluding that their rationales were unpersuasive. *Id.* at 20-36. Because the Fifth Circuit's ruling is en banc – and because it explicitly considered and rejected the rulings of the other circuits – the circuit split is intractable. The only way to resolve this issue is through intervention by this Court.

II. The Issue Is Recurring and Important to Both Crime Victims and Defendants.

How to interpret and construe Section 2259 is an issue that the lower courts are confronting on an almost daily basis. *See United States v. Wright*, 639 F.3d 679, 682 (5th Cir. 2011) (noting that interpreting Section 2259 is an issue "raised in a large number of federal district and circuit courts in recent years"). In fiscal year 2012, the district courts sentenced more than 2,000 defendants in criminal prosecutions where Section 2259 was the operative restitution statute. U.S. SENTENCING COMMISSION, 2012 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl. 3 (2013) (2,014 sentences for child pornography crimes; 428 defendants for sexual abuse crimes). That year, district judges ordered restitution in 250 child-pornography cases and 59 other sex abuse cases. *Id.* tbl. 15.[10]

The number of federal prosecutions for child pornography offenses has grown significantly during the past three decades, particularly in recent years. For example, the caseload of non-production offenses

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[10] Section 2259 mandates restitution for crimes "under this Chapter," 18 U.S.C. §2259(a) – i.e., Chapter 110 of Title 18 of the United States Criminal Code. All 250 child pornography cases reported by the Sentencing Commission are found in Chapter 110 and are thus subject to Section 2259, along with some additional number of other child sex offenses. In addition, there were probably a significant number of additional cases where Section 2259 was an issue, but the victims received no restitution.

increased from 624 cases in fiscal year 2004 to 1,649 in fiscal year 2011; during that same period, the annual number of production cases rose from 94 cases to 231 cases.[11] As the number of prosecutions has increased, so has the number of identified victims. In 2002, the National Center for Missing and Exploited Children identified 73 new child pornography "series" (i.e., a collection of child sex abuse images of the same child).[12] By January 2011, "more than 3,500 children depicted in child pornography have been identified. . . ."[13] The Justice Department has responded to this expanding victimization by increasing child pornography prosecutions 40% since fiscal year 2006.[14]

As the number of federal child pornography prosecutions increases, so does the number of victims seeking restitution. *See* Note, Michael A. Kaplan, *Mandatory Restitution: Ensuring that Possessors of*

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[11] U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: FEDERAL CHILD PORNOGRAPHY OFFENSES at 7 & n.43 (Dec. 2012).

[12] U.S. DEP'T OF STATE, U.N. COMM. ON THE RIGHTS OF THE CHILD: OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD ON THE SALE OF CHILDREN, CHILD PROSTITUTION & CHILD PORNOGRAPHY: PERIODIC REPORT OF THE UNITED STATES OF AMERICA & U.S. RESPONSE TO RECOMMENDATIONS IN COMM. CONCLUDING OBSERVATIONS OF JUNE 25, 2008, at 6-7 (Jan. 22, 2010), *available at* http://bit.ly/USPeriodicReport.

[13] Fact Sheet: Project Safe Childhood, U.S. DEPT. OF JUSTICE (last visited Oct. 17, 2012), *available at* http://bit.ly/PSCFactSheet.

[14] NAT'L STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION: A REPORT TO CONGRESS 5 (Aug. 2010), executive summary, *available at* http://bit.ly/NatStrategyExecSummary.

Child Pornography Pay for Their Crimes, 61 SYRACUSE L. REV. 531, 552 (2011). When victims of child sex offenses file restitution requests, district courts must confront the issue of how to interpret Section 2259 because Congress directed that "[t]he issuance of a restitution order under [§2259] is *mandatory*." 18 U.S.C. §2259(b)(4) (emphasis added).

Moreover, the circuit split has caused wildly differing restitution awards in factually identical cases. U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: FEDERAL CHILD PORNOGRAPHY OFFENSES 330 (Dec. 2012), available at http://bit.ly/USSCchild PornographyOffense ("The [child pornography] restitution statute has generated confusion and disparate result in courts around the country."). For example, after receiving essentially identical victim impact statements, district courts have awarded child pornography victims millions of dollars in restitution, no restitution, and various amounts of restitution in between. *Id.* at 117. Such divergent awards interfere with the important objective of uniformity in federal sentencing. *See United States v. Booker*, 543 U.S. 200, 253 (2005).

Finally, prompt review of the "proximate result" issue is important because a second circuit split has clearly developed on how to apply any such proximate result requirement. In cases with extremely similar facts the circuits have "reached different outcomes" which "cannot be entirely explained by the difference in the facts of the record." *Kearney*, 672 F.3d at 96. As explained in a recently-filed certiorari petition, "there

is a deep and mature split in the circuit and district courts concerning" how to determine whether losses are the proximate result of a particular defendant's crime. Petition for Cert. at 17, *Kearney v. United States*, No. 12-6574 (1st. Cir.) (filed Sept. 28, 2012) (collecting numerous authorities).[15] This Court cannot even begin to consider that issue until it decides the threshold issue of whether such a proximate result requirement even exists. This Court should accordingly first determine whether Section 2259 contains a general proximate result requirement by granting this petition. Any other petitions which raise additional, secondary issues should be held until the Court makes this determination.

For all these reasons, the issue of how to interpret Section 2259 is an important and recurring one worthy of this Court's review.

III. The Related Issue of Whether Restitution Is Punishment Under the Eighth Amendment Is Also Worthy of Review.

Paroline seeks review of not only the issue of whether Section 2259 contains a general proximate result requirement, but also the related issue of whether restitution is subject to the Eighth Amendment's limitation against excessive punishment. Paroline Pet. 14-15. The circuits (and a number of

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[15] This Court recently dismissed this petition on stipulated motion in light of Mr. Kearney's death.

state courts) are divided on this fundamental question. The Court should review this important issue as well.

The Excessive Fines Clause of the Eighth Amendment provides that "excessive fines [shall not be] imposed." U.S. Const., amdt. VIII. The Court applied the Excessive Fines Clause in a similar context in *United States v. Bajakajian*, 524 U.S. 321 (1998), holding that "[f]orfeitures-payments in kind-are . . . 'fines' if they constitute punishment for an offense." *Id.* at 328.

In this case, the district court cited *Bajakajian* to reach the conclusion that "construing the statute as Amy suggests could render section 2259 unconstitutional." 672 F.Supp.2d at 788. The Government raised this same argument below, but the Fifth Circuit rejected it. The Circuit held that "we are not persuaded that restitution is a punishment subject to the same Eighth Amendment limits as criminal forfeiture. Its purpose is remedial, not punitive." Paroline App. 37.

In so ruling, the Fifth Circuit added to a clear and mature circuit split. At least three other circuits have announced identical holdings. *United States v. Webber*, 536 F.3d 584, 602-03 (7th Cir. 2008) ("Restitution is remedial in nature, and its goal is to restore the victim's loss."); *see also United States v. Newell*, 658 F.3d 1, 35 (1st Cir. 2011), *cert. denied*, 132 S.Ct. 430 & 132 S.Ct. 1069 (2012); *Necula v. Conroy*, 13 F. App'x 24, 26 (2d Cir. 2001); *United States v. Bonner*, 522 F.3d 804, 807 (7th Cir. 2008), *cert. denied*, 555

U.S. 883 (2008). Additionally, the Sixth and Tenth Circuits have indicated in related reasoning that they will likely stand with the Fifth Circuit on this issue. *See United States v. Boring*, 557 F.3d 707, 714 (6th Cir. 2009); *United States v. Garcia-Castillo*, 127 F. App'x 385, 390 (10th Cir. 2005).[16]

On the other side of the circuit split are the Ninth and Eleventh Circuits, and perhaps others as well. In *United States v. Dubose*, 146 F.3d 1141 (9th Cir. 1998), *cert. denied*, 525 U.S. 975 (1998), the Ninth Circuit held that "restitution under the MVRA is punishment because the MVRA has not only remedial, but also deterrent, rehabilitative, and retributive purposes." *Id.* at 1144; *accord Wright v. Riveland*, 219 F.3d 905, 915 (9th Cir. 2000) (affirming *Dubose*). The Eleventh Circuit has taken the same position. *United States v. Siegel*, 153 F.3d 1256, 1259 (11th Cir. 1998) (concluding, for the same reasons, that restitution under the MVRA is 'punishment' for purposes of the Ex Post Facto Clause). Two other circuits have also suggested that the Eighth Amendment restricts restitution awards. *See United States v. Lessner*, 498 F.3d 185, 205 (3d Cir. 2007), *cert. denied*, 552 U.S.

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[16] These related holdings also implicate another circuit split: whether restitution is sufficiently penal to implicate the Ex Post Facto Clause. *Compare, e.g., United States v. Schulte*, 264 F.3d 656, 661-62 (6th Cir. 2001) (answering yes); *United States v. Dugan*, 150 F.3d 865, 868 (8th Cir. 1998) (same), *with, e.g., United States v. Newman*, 144 F.3d 531, 542 (7th Cir. 1998) (answering no); *United States v. Nichols*, 169 F.3d 1255, 1279-80 (10th Cir. 1999) (same).

1260 (2008); *United States v. Bollin*, 264 F.3d 391, 419 (4th Cir. 2001), *cert. denied*, 534 U.S. 935 (2001).

The split of authority extends to the state courts. Although this Court has never incorporated the Excessive Fines Clause against the states, *McDonald v. City of Chicago, Ill.*, 130 S.Ct. 3020, 3035 n.13 (2010), many states courts have either assumed incorporation or consider this Court's holdings almost dispositive for purposes of similarly worded state constitutional provisions. These state courts are clearly divided on whether restitution is punishment under the Excessive Fines Clause. For example, courts in Delaware, New Jersey, and Colorado hold that restitution is a remedy, not a punishment. *Benton v. State*, 711 A.2d 792, 799 (Del. 1998) ("Accordingly, we have concluded that the Superior Court's order of restitution was not a punitive fine at all and a fortiori was not imposed in violation of the Eighth Amendment."); *State v. DeAngelis*, 747 A.2d 289, 295-96 (N.J. App. Div. 2000) ("The restitution order in this case does not violate the prohibition against excessive fines."); *People v. Stafford*, 93 P.3d 572, 574 (Colo. Ct. App. 2004) ("[F]or purposes of Eighth Amendment analysis, restitution is not the equivalent of a fine."). In contrast, courts in Montana and Iowa hold that restitution is punishment and therefore subject to the Excessive Fines Clause. *State v. Good*, 100 P.3d 644, 649 (Mont. 2004) ("[A]s *Bajakajian* tells us, restitution of the kind imposed upon Good is still punitive in part and therefore is within the purview of the Excessive Fines Clause."); *State v. Izzolena*, 609 N.W.2d

541, 549 (Iowa 2000) ("The [restitution] award is a 'fine' within the Eighth Amendment of the United States Constitution. . . .").

The Court should review this significant constitutional question by granting Paroline's certiorari petition. If the Court grants review, Paroline will argue (as he has in his petition) that Section 2259 should be interpreted to avoid constitutional doubt under the Eighth Amendment by reading a general proximate result interpretation into it. If the Government adheres to the position it argued below, it will take the same view. Amy will respond by defending the Fifth Circuit's holding below that the Eighth Amendment is not implicated at all when interpreting Section 2259 because it is a restitution statute that compensates victims rather than imposing punishment. This Court's ruling will resolve the circuit split among the Courts of Appeals (and among various state courts too).

IV. *Paroline* Is the Right Case (and *Wright* Is the Wrong Case) to Determine How to Interpret the Mandatory Restitution for Sexual Exploitation of Children Act of 1994.

Paroline's petition is a good vehicle for reviewing the question of how to construe Section 2259, while Wright's petition is not. Unlike many other cases pending in the lower courts, Paroline involves an adversarial presentation of the critical "proximate

result" issue. Wright, on the other hand, involves a non-adversarial case that is effectively moot.

A. The Court Should Grant Review of Paroline's Petition.

In the vast majority of child pornography restitution cases pending in the lower courts, only the Government and the defendant are directly litigating the restitution issue. In a typical child pornography prosecution, a victim files a restitution request in the district court without the assistance of legal counsel. Even if a victim has legal counsel, counsel will rarely appear or intervene in a case. Instead, a restitution request substantiating losses along with a victim impact statement is submitted to the United States Attorney's victim-witness coordinator, who forwards it to the probation office. Because the Justice Department's current litigation position is that Section 2259 contains a general proximate cause requirement, many lower court cases were not decided in an adversarial posture; the Government and the defendant *both* agree that Section 2259 requires proximate cause. Indeed, this lack of adversarial presentation of the issues likely explains why many circuits have ruled that Section 2259 contains a proximate cause requirement.

In contrast, Paroline's petition involves a case in which restitution was fully and fairly litigated by opposing parties from the district court through the Court of Appeals. Recognizing the importance of the

issue, the district court invited Amy to present her best case supporting restitution and developed an extensive record concerning restitution. Despite her involvement, the district court denied Amy restitution and Amy appealed. The Fifth Circuit then reviewed the case three separate times with several dissenting opinions. Accordingly, unlike the vast majority of cases at every level, Paroline's case has a fully-developed factual record along with a comprehensive distillation of every competing legal position.[17]

The Government may claim that the *Paroline* case is somehow in an "interlocutory" posture because the Fifth Circuit ultimately remanded. The case, however, stands in an interlocutory posture in name only. The Fifth Circuit sent the case back to the district court with explicit directions that "[o]n remand, the district court must enter a restitution order reflecting the 'full amount of [Amy's] losses' in light of our holdings today." Paroline App. 41. Little remains to be done. Given the Fifth Circuit's en banc holding, the critical "proximate result" issue presented by Paroline in his petition has been finally decided by the court below.

The technical "interlocutory" posture of this case is simply one factor the Court considers. It is not a

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[17] Paroline is also represented by capable and experienced counsel, Stanley G. Schneider, who was appointed by the district court specifically to insure that Paroline received effective appellate representation.

bar to this Court's review. *See* 28 U.S.C. §1254(1). The Court can grant certiorari to review interlocutory decisions involving a fundamental issue of law important to the further conduct of a case. *See Mazurek v. Armstrong*, 520 U.S. 968, 975 (1997); EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE §4.18 at 281 (9th ed. 2008) (collecting cases). Indeed, this Court frequently grants review when a lower court decides an important issue otherwise worthy of review, and an immediate decision will hasten resolution of the litigation. *See, e.g., F. Hoffmann-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (vacating denial of motion to dismiss); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver,* 511 U.S. 164 (1994) (reversing denial of summary judgment).

Resolution of the issues in this case is obviously important to Paroline and countless other criminal defendants, as well as to Amy and numerous other victims. But just as important are the interests of the federal judiciary in avoiding continuing litigation. Given the many circuits aligned against the Fifth Circuit's holding, every defense attorney in a child pornography case in the Fifth Circuit must now appeal the issue and file a certiorari petition to protect their clients' interests. In the other circuits, crime victims must file claims raising the Fifth Circuit's approach. In the circuits that require proximate cause, the district courts continue to struggle to understand where the requirement comes from and what it really means. The often-litigated issues surrounding Section 2259 need to be resolved.

If the Court decides that the interlocutory posture of this case is a barrier to review, it has one previously-filed petition and one soon-to-be-filed petition from two final child pornography restitution decisions that could allow it to review the issue. Amy (and another victim, Vicky) have a currently pending certiorari petition before this Court seeking review of the Ninth Circuit's decision in *United States v. Kennedy*. (No. 12-651). And Vicky will soon seek review of the Eight Circuit's decision in *United States v. Fast*. If the Court decides not to grant certiorari in this case, then the Court could – and should – grant certiorari in either of these two other cases.

B. The Court Should Deny Review of Wright's Petition.

Wright's petition is an obvious example of a non-adversarial certiorari petition. While it is true that Amy was allowed to participate as an amicus in the court below, she is not a party to the criminal case, *United States v. Wright*. Thus, if the Court grants Wright's certiorari petition, no one will defend the judgment below since both Wright and the Government agree that Section 2259 does not contain a general proximate result limitation. If the Court grants certiorari in Wright's case, the Court will then need to appoint an attorney to argue in defense of the judgment below. The Court's ability to invite such representation is controversial. *See, e.g.*, Note, Brian P. Goldman, *Should the Supreme Court Stop Inviting Amici Curiae to Defendant Abandoned Lower Court*

Decisions?, 63 STAN. L. REV. 907 (2011). Because there are other, less problematic vehicles to address Section 2259, the Court should avoid the needless complications entailed by granting Wright's petition.[18]

The Court should also deny Wright's petition because he executed an appeal waiver as part of his plea agreement. The court below considered Wright's case only because it found that the Government was not enforcing the waiver. Paroline App. 5-6 n.4. It is unclear whether the Government will be as accommodating before this Court since in other cases it has argued that an appeal waiver deprives the appellate court of subject matter jurisdiction to consider the case. *See, e.g., United States v. Hahn*, 359 F.3d 1315, 1320-22 (10th Cir. 2004) (describing and rejecting Government's jurisdictional argument). *But cf. United States v. Jacobo Castillo*, 496 F.3d 947, 957 (9th Cir. 2007) (while appeal waivers are not jurisdictional bars to reviewing a case, they are enforceable absent a miscarriage of justice). A case with such unresolved procedural issues is a poor vehicle for reviewing an important restitution question.

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[18] If the Court grants certiorari in Wright's case, the logical amicus to defend the judgment below is Amy's counsel, since Amy's counsel both argued as an amicus below and obtained the judgment below. *See, e.g., United States v. Dickerson*, 528 U.S. 1045 (1999) (inviting Paul G. Cassell, Esq., to brief and argue as amicus curiae in support of the judgment below when he argued and obtained the judgment below as an amicus).

Finally, the Wright petition also suffers from the problem that the restitution issue has effectively become moot in this case. Although Wright does not disclose this fact in his petition, Amy long ago withdrew her restitution request. *See* June 3, 2011 Letter from Amy's Counsel (appended to this brief). The district court was unable to take action on that letter while the matter was before the Fifth Circuit. But on December 11, 2012, the Fifth Circuit issued its mandate, sending the case back to the district court. Unlike the *Paroline* case where the district court stayed further proceedings pending this Court's action,[19] the district court in the *Wright* case is now free to consider Amy's letter and dismiss the restitution award at any time without further ado.[20] Thus, "the course of legal proceedings" against him is now "hypothetical," a fact strongly arguing against this Court exercising its certiorari jurisdiction. *See Padilla v. Hanft*, 547 U.S. 1062, 1063 (2006) (Kennedy, J., concurring).

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[19] *See USA v. Paroline*, Order Granting Motion to Stay, Eastern District of Texas Criminal Docket for Case No. 6:08-cr-00061-LED-JDL-1, Doc. 79 (filed Feb. 25, 2013).

[20] Interestingly, the circuits appear to be divided on whether a court is required to order a defendant convicted of a qualifying offense to pay restitution in the absence of a formal assignment of rights by the victim. *Compare United States v. Johnson*, 378 F.3d 230, 244-46 (2d Cir. 2004) (district court must impose restitution under the Mandatory Victims Restitution Act) *with, e.g., United States v. Speakman*, 594 F.3d 1165, 1175-76 (10th Cir. 2010) (restitution must go to victims of crimes, and court may not order restitution paid to the Crime Victims Fund in the absence of a victim recipient).

V. The Fifth Circuit Properly Interpreted the Child Pornography Restitution Statute.

If this Court grants review in the *Paroline* (or *Wright*) case, it should affirm the Fifth Circuit's well-reasoned decision. As the Fifth Circuit correctly recognized en banc, Section 2259 is a "clearly-worded statute." Paroline App. 28 n.13. The statute provides that a district court "shall direct the defendant to pay the victim . . . the *full amount* of the victim's losses. . . ." 18 U.S.C. §2259(b)(1) (emphasis added). The statute then defines those losses as follows:

> (3) Definition. – For purposes of this subsection, the term "full amount of the victim's losses" includes any costs incurred by the victim for –
>
> (A) medical services relating to physical, psychiatric, or psychological care;
>
> (B) physical and occupational therapy or rehabilitation;
>
> (C) necessary transportation, temporary housing, and child care expenses;
>
> (D) lost income;
>
> (E) attorneys' fees, as well as other costs incurred; and
>
> (F) any other losses suffered by the victim *as a proximate result* of the offense.

18 U.S.C. §2259(b)(3) (emphasis added).

Section 2259's plain language is dispositive. "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (internal citations omitted) (internal quotation marks omitted). Section 2259 should be interpreted according to the Alpha and Omega of statutory construction – its plain, conclusive language. Congress enacted a law that requires victims of child pornography to establish proximate result only for losses listed in subsection (F). If Congress wanted the "proximate result" limitation to run throughout the statute, it could easily have placed the phrase at the beginning of the list of losses or at the very end of the list in a stand-alone clause. Congress did neither.

Any other reading of the statute would interfere with Congress' overarching remedial purpose. Congress enacted a broad mandatory restitution statute that promises child pornography victims that they will receive restitution for the "full amount" of their losses. 18 U.S.C. §2259(b)(1). Congress sought to address the serious, life-long injuries that child pornography victims suffer. As this Court explained, "A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography. . . . It is the fear of exposure and the tension of keeping the act secret that seem to have the most profound emotional repercussions." *New York v. Ferber*, 458 U.S. 747, 759 n.10 (1982).

In adopting Section 2259, Congress intended "to make whole . . . [these] victims of sexual exploitation." *United States v. Danser*, 270 F.3d 451, 455 (7th Cir. 2001). This generous remedial purpose was highlighted in *United States v. Julian*, 242 F.3d 1245 (10th Cir. 2001), which explained that Congress generally sought through mandatory restitution "to ensure that 'the wrongdoer is required to the degree possible to restore the victim to his or her prior state of well being.'" *Id.* at 1247 (*quoting* Sen. Rep. 104-179, at 42-44 (1995)).

Section 2259 also broadly extends its protections to any "victim" who is merely "harmed" by a crime of child pornography, requiring neither "proximate harm" nor "direct harm." *See* 18 U.S.C. §2259(c) ("For purposes of this section, the term 'victim' means the individual *harmed* as a result of a commission of a crime under this chapter. . . ."). By purposely omitting narrowing qualifiers like "proximately" and "directly" found in other general restitution statutes, the clear inference is that Congress decided not to burden child pornography victims – a particularly vulnerable and disadvantaged subset of victims – with the obligation to demonstrate a "direct" or "proximate" harm before receiving restitution. *Cf.* 18 U.S.C. §3663(a)(2) (defining "victim" as "a person *directly* and *proximately* harmed as a result of [the crime]" (emphasis added)).

Yet despite these broad aims and expansive provisions, Paroline's interpretation of the statute converts it into a parsimonious regime that is "largely unworkable." *United States v. Paroline*, 672 F.Supp.2d

781, 793 n.12 (E.D. Tex. 2009). As the plethora of diverse lower court attempts to calculate restitution demonstrates, it is almost impossible for child pornography victims whose images are widely trafficked on the internet to trace precisely how their losses are the "proximate result" of any individual defendant's crime. For example, the Ninth Circuit acknowledged its proximate cause interpretation "will continue to present [a] serious obstacle[ ] for victims seeking restitution in these sorts of cases." 643 F.3d at 1266.

If the Fifth Circuit's ruling is overturned, it will condemn Amy and countless other child pornography victims to years of litigation across the country attempting to link specific losses to individual defendants in particular cases. District courts will struggle to determine precisely what losses should be assigned to specific defendants without regard to other criminals already prosecuted in other jurisdictions, other criminals who have not yet been apprehended and prosecuted, and still others who are beyond the law's reach. Congress did not intend for child pornography victims to bear such an impossible burden in which "the intent and purposes of §2259 would be impermissibly nullified . . . in virtually *every* case. . . ." *In re Amy*, 591 F.3d 792, 797 (5th Cir. 2009) (Dennis, J., dissenting). Instead, Congress broadly commanded that district courts must award restitution in every case for "the full amount of the victim's losses." 18 U.S.C. §2259(b)(1).

This Court should review and affirm the Fifth Circuit's en banc decision and construe the Mandatory Restitution for Sexual Exploitation of Children Act of 1994, 18 U.S.C. §2259, in a way which guarantees that child pornography victims will receive the full restitution Congress intended.

CONCLUSION

Paroline's petition for a writ of certiorari should be granted and then the Fifth Circuit's decision affirmed.[21]

Respectfully submitted,

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[21] If the Court grants certiorari in this case, it should require Paroline and the Government to divide the petitioner's argument time between themselves, as they both attack the judgment below. Amy should receive the argument time of respondents, as she alone defends the judgment below. The Fifth Circuit below assigned half of the argument time to Amy, and this Court has followed a similar approach in other cases. *See, e.g., Dickerson v. United States*, 528 U.S. 1045 (1999) (mem.) (criminal defendant and government attacking judgment below assigned to petitioner side of the case).

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June 3, 2011 (Filed Jun. 7, 2011)

Loretta G. Whyte
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Re: **United States of America v. Michael Wright**
Case Number: 09-103 "N"
USM Number 30965-034

Dear Ms. Whyte,

Please be advised that I hereby withdraw with prejudice the request for criminal restition filed in the above-named case on July 15, 2009 on behalf of Amy, the victim in the Misty child pornography series.

Please contact me if you have any questions. Thank you.

Very truly yours,

/s/ James R. Marsh
James R. Marsh

cc: Donna Duplantier, Victim Witness Coordinator
Diane Copes, Assistant United States Attorney
Brian Klebba, Assistant United States Attorney
Roma A. Kent, Federal Public Defender

RESPONDENT'S BRIEF

RECORD
AND
BRIEFS

No. 12-8561

Supreme Court, U.S.
FILED
NOV 13 2013
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In The
Supreme Court of the United States

DOYLE RANDALL PAROLINE,

Petitioner,

vs.

AMY UNKNOWN and UNITED STATES,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT AMY'S BRIEF ON THE MERITS

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QUESTION PRESENTED

What, if any, causal relationship or nexus between the defendant's conduct and the victim's harm or damages must the government or the victim establish in order to recover restitution under 18 U.S.C. 2259?

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BRIEF FOR RESPONDENT AMY

OPINIONS BELOW

The en banc opinion of the court of appeals below is reported at 701 F.3d 749 (5th Cir. 2012) (en banc) (J.A. 349-424). The panel opinion is reported at 636 F.3d 190 (5th Cir. 2011) (J.A. 325-48), which granted mandamus on rehearing from 591 F.3d 792 (5th Cir. 2009) (J.A. 298-310), which in turn affirmed the district court's decision in *United States v. Paroline*, 672 F.Supp.2d 781 (E.D. Tex. 2009) (J.A. 271-310).

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are set forth in App., *infra*, 1-41.

STATEMENT

Amy's Victimization

When she was eight and nine years old, respondent Amy[1] was repeatedly raped by her uncle in order to produce child pornography. The images of her abuse depict Amy being forced to endure vaginal and anal rape, cunnilingus, fellatio, and digital penetration. Amy was sexually abused specifically for the purpose of producing child sex abuse images; her uncle required her "to perform sex acts" requested by others who wanted her images for their own sexual gratification. J.A. 70. Amy's abuser pleaded guilty to production of child pornography, in violation of 18 U.S.C. 2251(a), and in 1999 was sentenced to 121 months in prison. *United States v. Zebroski*, No. 3:98-CR-00243 (M.D. Pa. 1999). He was also ordered to pay the psychological counseling costs Amy had incurred up to that time, a total of $6,325.

By the end of her treatment in 1999, Amy was (as reflected in her therapist's notes) "back to normal" (J.A. 70) and engaged in age-appropriate activities such as dance. Sadly, eight years later, Amy's condition drastically deteriorated when she learned that her child sex abuse images were widely traded on the Internet. J.A. 71. The "Misty" series depicting Amy is one of the most widely-circulated sets of child

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[1] To protect her privacy, Amy proceeds here by way of a pseudonym.

sex abuse images in the world. According to her psychologist, the global trafficking of Amy's child sex abuse images has caused "long lasting and life changing impact[s] on her." J.A. 82. "Amy's awareness of these pictures [and] knowledge of new defendants being arrested become ongoing triggers to her." J.A. 84. As Amy explained in her own, personal victim impact statement, "Every day of my life I live in constant fear that someone will see my pictures and recognize me and that I will be humiliated all over again." J.A. 60.

The ongoing victimization Amy suffers from the continued distribution and collection of her images will last throughout her entire life. She could not complete college and finds it difficult to engage in full-time employment because she fears encountering individuals who may have seen her being raped as a child. J.A. 77, 82. She will also require weekly psychological therapy and occasionally more intensive inpatient treatment throughout her life. J.A. 86.[2]

Petitioner's Crime and the District Court Proceedings

One of the criminals who joined in the collective exploitation of Amy is petitioner Doyle Randall

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[2] The *New York Times Magazine* recently published a cover story about the difficulties faced by Amy and other child pornography victims. Emily Bazelon, *The Price of a Stolen Childhood*, N.Y. Times Mag. (Jan. 24, 2013), http://www.nytimes.com/2013/01/27/magazine/how-much-can-restitution-help-victims-of-child-pornography.html?_r=0.

Paroline. In 2008, law enforcement agents discovered that he had downloaded several hundred images of young children (including toddlers) engaging in sexual acts with adults and animals. When the agents questioned him about the images, he admitted he had been downloading child pornography for two years. On January 9, 2009, he pleaded guilty to one count of possession of material involving the sexual exploitation of children in violation of 18 U.S.C. 2252(a)(4)(B), a ten-year felony. 18 U.S.C. 2252(b)(2).

The FBI then sent the images to the National Center for Missing and Exploited Children (NCMEC). Its analysis revealed that Amy was one of the children victimized in these images. Based on that information, the United States Attorney's Office notified Amy's trial counsel that Amy was an identified victim in petitioner's criminal case. J.A. 22-26. Amy's counsel then submitted a detailed restitution request on Amy's behalf, describing the harm she endures from knowing that she is powerless to stop the Internet trading of these images. J.A. 27-116. In her restitution request, Amy sought full restitution of $3,367,854 from petitioner for lost wages and psychological counseling costs.

On June 10, 2009, the district court sentenced petitioner to 24 months in prison. During a later adversarial restitution hearing, Amy's counsel and the Government defended her full restitution request against petitioner's attacks. J.A. 145-71.

On December 7, 2009, the district court issued an opinion declining to award Amy any restitution even

though restitution for the "full amount" of a victim's losses is "mandatory" under 18 U.S.C. 2259(b)(1) & (b)(4). The court began by making a factual finding that Amy was a "victim" of petitioner's crime because of his gross invasion of her privacy. J.A. 279-80. Although the district court recognized that a "significant" part of Amy's losses is "attribut[able] to the widespread dissemination and availability of her images and the possession of those images by many individuals such as [petitioner]," it nonetheless refused to award her any restitution because she could not prove exactly what losses proximately resulted from petitioner's crime. *Id.* at 292-96. The district court acknowledged that its interpretation of the child pornography restitution statute rendered it "largely unworkable." *Id.* at 296 n.12.

The Fifth Circuit Proceedings

Amy promptly sought review of the district court's denial of her restitution request, employing the appellate review provision found in the Crime Victims' Rights Act (CVRA), 18 U.S.C. 3771(d)(3). Acting quickly, a divided panel of the Fifth Circuit declined to grant any relief, with Judge Dennis dissenting. J.A. 298-310.

Amy then petitioned for rehearing. On March 22, 2011, a unanimous panel of the Fifth Circuit granted Amy's petition and concluded that the district court had "clearly and indisputably erred" in grafting a proximate result requirement onto the restitution

statute. J.A. 338-48. Petitioner successfully sought rehearing en banc.

On November 19, 2012, the Fifth Circuit en banc held 10 to 5 that 18 U.S.C. 2259 does not require a child pornography victim to establish that her losses were the proximate result of an individual defendant's crime in order to secure restitution. The Fifth Circuit concluded Section 2259 creates a system of joint and several liability which "applies well in these circumstances, where victims like Amy are harmed by defendants who have collectively caused her a single harm." J.A. 393. After resolving the statutory construction issue in Amy's favor, the Fifth Circuit remanded, directing that "the district court must enter a restitution order reflecting the 'full amount of [Amy's] losses'. . . ." J.A. 403 (quoting 18 U.S.C. 2259(b)(1)).

Petitioner sought review in this Court. Amy agreed that review was appropriate. This Court then granted certiorari.

SUMMARY OF THE ARGUMENT

Amy asks this Court to enforce a "mandatory" restitution statute that promises her that she will receive restitution for the "full amount" of her losses. 18 U.S.C. 2259(b)(1). The other parties to this case both agree with Amy that Congress enacted a broad restitution statute designed to "ensur[e] full compensation of the losses [suffered by] the victims of child

pornography distribution and possession." Pet. Br. 48; *see also* Gov't Br. 15. Yet remarkably petitioner asks this Court to affirm a district court decision that interpreted the statute to be "largely unworkable" and gave Amy no restitution at all. J.A. 296 n.12. The Government's approach also results in far less than "full" restitution. While arguing that petitioner has factually and proximately caused all of Amy's losses, the Government ultimately asks this Court to give district courts "significant leeway" to award Amy only a miniscule, fractional amount of the full restitution the statute mandates she be awarded. Gov't Br. 49.

The Court should read Section 2259 to achieve Congress's explicit compensatory aims, not to thwart them. As the Fifth Circuit en banc interpreted the statute, it does not require a child pornography victim to establish precisely what fraction of, for example, her psychological counseling costs are the proximate result of an individual defendant's crime. Instead, victims like Amy must first establish that they suffered "harm" from a defendant's child pornography crime. *See* 18 U.S.C. 2259(c). This cause-in-fact link or nexus between an individual's harm and a defendant's crime establishes a statutorily-recognized "victim" entitled to restitution for the "full amount" of her losses. 18 U.S.C. 2259(c) & (b)(1). This case comes to this Court on a factual finding that petitioner harmed Amy—a finding that was unchallenged below and is well-supported by the record.

Next, the victim establishes the "full amount" of her losses from child pornography. In this case Amy

provided detailed, expert evidence of, for example, the projected costs for psychological counseling she requires due to being a victim of child pornography. These costs are the losses Congress commanded must be awarded as restitution. Accordingly, as the Fifth Circuit held, the district court should have entered a restitution award in Amy's favor for this amount, thereby making petitioner jointly and severally liable for her full losses along with other defendants convicted in other cases.

The Fifth Circuit's practical interpretation of Section 2259 follows applicable tort law principles—i.e., the principles providing ample compensation to victims of intentional torts. Section 2259 applies to serious felonies with stringent mens rea requirements. For such intentional torts committed against vulnerable victims, the common law was never concerned about strict "proximate cause" limitations, but instead imposed broad joint and several liability. When choosing between equalizing the liability of intentional wrongdoers and fully compensating those harmed by wrongdoers, the common law has always sided with victims. Congress wisely did the same thing in enacting Section 2259. This Court should accordingly affirm the Fifth Circuit's decision in all respects.

ARGUMENT

I. CHILD PORNOGRAPHY PRODUCERS, DISTRIBUTORS, AND POSSESSORS COLLECTIVELY CREATE A GLOBAL MARKET FOR THE SEXUAL ABUSE OF CHILDREN

Amy agrees with the Government that Section 2259 must be interpreted in light of an important background principle (Gov't Br. 15-17), although she believes the principle extends further than the Government articulates. The Government contends that "the possession of child pornography is not a victimless crime." Gov't Br. 16.[3] This much is undeniably true. Congress found that "[e]very instance of viewing images of child pornography represents a renewed violation of the privacy of the victims and repetition of their abuse." Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 501(2)(D), 120 Stat. 623, 624. As this Court has explained, "A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography. . . . It

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[3] While Amy follows the other parties in using the legal term "child pornography," that term "contributes to a fundamental misunderstanding of the crime—one that . . . leaves the impression that what is depicted in the[se] photograph[s] is [adult] 'pornography' rather than images memorializing the sexual assault of children." U.S. Dep't of Justice, *The National Strategy for Child Exploitation Prevention and Interdiction: A Report to Congress* 8 (2010) (hereinafter "*DOJ Report to Congress*"). *See generally* Philip Jenkins, *Beyond Tolerance: Child Pornography on the Internet* 9 (2001).

is the fear of exposure and the tension of keeping the act secret that seem to have the most profound emotional repercussions." *New York v. Ferber*, 458 U.S. 747, 759 n.10 (1982).

This important background principle, however, extends beyond recognizing the harms child pornography causes victims to understanding the vast criminal machinery that generates those harms. In enacting laws criminalizing all aspects of child pornography, Congress realized that it had to address every stage of this sordid joint enterprise—countless criminals who together create, distribute, and possess child pornography. As this Court explained, "it is difficult, if not impossible to halt" the sexual exploitation and abuse of children by pursuing only child pornography producers. *Ferber*, 458 U.S. at 759-60. It was therefore reasonable for Congress to conclude that "the production of child pornography [will decrease] if it penalizes those who possess and view the product, thereby decreasing demand." *Osborne v. Ohio*, 495 U.S. 103, 109-10 (1990). Indeed, "[t]he most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties" on all persons in the distribution chain. *Ferber*, 458 U.S. at 760. Congress did just that by criminalizing child pornography possession. *See, e.g.*, 18 U.S.C. 2252(a)(4).

Congress properly recognized that child pornography possessors are inextricably linked to child pornography producers. Congressional findings concerning Chapter 110 explain that "prohibiting the

possession and viewing of child pornography will . . . [help] to eliminate the market for the sexual exploitative use of children. . . ." Pub. L. No. 104-208, 121(12), 110 Stat. 3009-27 (1996); *see also* 132 Cong. Rec. 33781 (1986) (statement of Sen. Roth) ("[M]y subcommittee's investigation disclosed the existence of a seamy underground network of child molesters . . . and it showed that the very lifeblood of this loosely organized underground society is child pornography."). A recent Justice Department analysis reported that "the growing and thriving market for child pornographic images is responsible for fresh child sexual abuse—because the high demand for child pornography drives some individuals to sexually abuse children and some to 'commission' the abuse for profit or status." *DOJ Report to Congress, supra*, at 17.

The record in this case sadly demonstrates the manner in which collectors of child pornography directly cause the sexual abuse of children. Amy was forced to perform sex acts to satisfy the demands of criminals who wanted her child pornography images. J.A. 70. "Most if not all of this activity was for the purpose of producing the child pornography [ultimately] possessed . . . by [petitioner]." J.A. 29.

Once a child like Amy is sexually abused to produce digitized child pornography, the images can be disseminated exponentially. Peer-to-peer file sharing (commonly called "P2P") is "widely used to download child pornography." U.S. Sentencing Commission, *Report to the Congress: Federal Child Pornography Offenses* 51 (2012) (hereinafter "*Sentencing Comm'n*

Report to Congress"). Two recent law enforcement initiatives "identified over 20 million unique IP [Internet Protocol] addresses offering child pornography over P2P networks from 2006 to August 2010." *Id.* at 51-52. The ease with which child pornography can now be downloaded creates "an expanding market for child pornography [that] fuels greater demand for perverse sexual depictions of children, making it more difficult for authorities to prevent their sexual exploitation and abuse." *United States v. Reingold*, 731 F.3d 204, 217 (2d Cir. 2013).

In this case, petitioner downloaded several hundred images of toddlers and other children being sexually abused—including two depicting Amy. J.A. 146. Sadly, petitioner is not alone in exploiting Amy. "The National Center for Missing and Exploited Children . . . has found at least 35,000 images of Amy's abuse among the evidence in over 3,200 child pornography cases since 1998 [and] . . . the content of these images [is] 'extremely graphic.'" J.A. 352. Petitioner is just one of many cogs in the vast machinery that sexually abuses and exploits children through child pornography. *See* Rachel O'Connell, *Paedophiles Networking on the Internet, in Child Abuse on the Internet: Ending the Silence* 65, 77 (Carlos A. Arnaldo ed. 2001) (networks for sharing child pornography are "an example of a complex criminal conspiracy"). This Court should decide this case against the sobering reality that Congress needed to respond to a vast, de facto joint criminal

enterprise of child pornography producers, distributors, and possessors.

II. IN ORDER TO RECEIVE RESTITUTION, AMY MUST FIRST ESTABLISH A CAUSE-IN-FACT LINKAGE TO THE PETITIONER'S CRIME BY SHOWING SHE WAS "HARMED" BY HIS CRIME

Reading Section 2259 against the backdrop of a de facto joint enterprise of thousands of child pornography offenders helps clarify why Congress reasonably determined that victims should collect "full" restitution from each convicted defendant. A victim of child pornography must establish a cause-in-fact linkage to an individual defendant's crime by proving that she is a victim who was "harmed" by his crime. 18 U.S.C. 2259(c). Once she establishes that link, however, she does not have to quantify precisely what part of her losses are attributable to a specific crime or criminal defendant. Instead, Congress required district courts to award restitution to a child pornography victim from each individual defendant for the "full amount of the victim's losses" from child pornography. 18 U.S.C. 2259(b)(1). The next three parts in this brief address each of these three aspects of restitution under Section 2259: the cause-in-fact nexus created through the statute's "victim" definition; the absence of a traditional "proximate result" requirement within the statute; and the statute's system of joint and several liability.

Turning to the first aspect—the "victim" definition issue—petitioner concedes that Amy "argued persuasively that possession of child pornography causes harm to the minors depicted." Pet. Br. 49. Petitioner suggests, however, that Amy did not link any of her harm to him. *Id.* at 49-51, 61. This case undoubtedly presents a special circumstance where Amy is harmed by multiple wrongdoers. *See* J.A. 391 n.14 ("No other crime involves single victims harmed jointly by defendants" scattered across the country). Yet even though Amy was harmed by multiple criminals, she remains a "victim" of petitioner.

In Section 2259, Congress broadly defined the "victim" entitled to receive restitution from a child pornography defendant as "the individual *harmed* as a result of a commission of a crime under this chapter [i.e., Chapter 110, regarding child pornography crimes]." 18 U.S.C. 2259(c) (emphasis added). Importantly, in both the Mandatory Victim Restitution Act (MVRA) and the general federal restitution statute, Congress more narrowly defined "victim" as "a person *directly and proximately harmed* as the result of the commission of an offense. . . ." 18 U.S.C. 3663A(a)(2) (emphasis added); *see also* 18 U.S.C. 3663(a)(2) (same). In Section 2259, Congress consciously omitted the narrowing modifiers "directly" and "proximately" found in these more broadly-applicable restitution statutes. Indeed, when Congress enacted the MVRA, it made conforming amendments to other parts of the earlier-enacted Section 2259. *See* Pub. L. No. 104-132, 110 Stat. 1214,

1231 (1996). Yet Congress deliberately chose *not* to conform Section 2259's definition of "victim" to the more restrictive, proximately-harmed definition in the MVRA. *See* S. Rep. No. 104-179 at 14 (1996) ("No change is made to the scope of restitution required under the Violence Against Women Act provisions [e.g., Sections 2248, 2259, and 2264]"). This is because Congress intended that restitution be broadly available for child pornography victims and other particularly-vulnerable victims of certain serious crimes.[4]

Petitioner ignores the fact that the district court found that Amy was "harmed as a result of" his crime. 18 U.S.C. 2259(c). Petitioner criminally possessed Amy's images as part of his crime of conviction. J.A. 277-78. The district court specifically found that his possession "harmed" Amy (J.A. 282) in several ways, such as perpetuating the abuse perpetrated during the original production of the images, and continuing the invasion of her privacy. J.A. 279-80. Petitioner did not appeal from that finding and, indeed, in the court below, he specifically agreed that "Amy is a 'victim' for purposes of Section 2259 as a result of [his] conduct. . . ." Paroline's Br. on

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[4] Congress used the broader "victim" formulation not only in the restitution statute for child pornography victims, but also in the restitution statutes for sexual assault victims, 18 U.S.C. 2248(c), and domestic violence victims, 18 U.S.C. 2264(c). In 2000, Congress applied this same broad formulation for human trafficking victims. 18 U.S.C. 1593(c).

Rehearing En Banc at 40 (5th Cir. March 26, 2012).[5] Amy and the Government also agreed with this finding, as has every court of appeals presented with this issue. *See, e.g., United States v. Kearney*, 672 F.3d 81, 94 (1st Cir. 2012) ("individuals depicted in child pornography are harmed by the continuing dissemination and possession of such pornography containing their image").

This "victim" finding does not hinge on how stringently the "harmed as a result of" language in Section 2259(c) is interpreted. Amy believes that the causal connection or nexus must be something less demanding than "direct and proximate" in light of Congress's deliberate omission of these terms from this particular provision. But Amy can satisfy

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[5] At various points in his brief, petitioner now appears to take a different position, claiming that Amy stipulated that she suffered no harm from him. *See, e.g.*, Pet. Br. 66. In fact, Amy's position was—and remains—that petitioner and other criminals collectively harmed her through an ongoing de facto joint criminal enterprise, as the district court acknowledged in rejecting petitioner's argument about the stipulation. J.A. 295 n.11.

Concluding that Amy was harmed by petitioner does not require a finding that she knew his name. If Amy discovered one night that a crowd was leering into her bedroom window watching her being raped, she would be harmed and could seek compensation from each participant without knowing any of their names. That is why Amy stipulated narrowly that none of the losses for which she is seeking restitution "flow from anyone telling her specifically about [petitioner] or telling her about his conduct which was the basis of the prosecution in this case." J.A. 230.

whatever standard is imposed, as the unchallenged finding below demonstrates.

The requirement that Amy show she is a "victim" of petitioner establishes a cause-in-fact linkage between her restitution request and petitioner. Section 2259 requires an individual seeking restitution to show that she was harmed by a particular crime committed by the individual defendant from whom she is seeking restitution. This harm can be shown from the simple fact that child pornography possession "increases the emotional and psychic *harm* suffered by the child." *Ferber*, 458 U.S. at 759 n.10 (emphasis added) (internal quotation omitted). This harm creates a nexus between Amy and petitioner, supporting the "mandatory" restitution obligation. 18 U.S.C. 2259(b)(4).

III. ONCE SHE ESTABLISHES "VICTIM" STATUS, AMY DOES NOT NEED TO ESTABLISH WHAT PART OF HER LOSSES WERE THE "PROXIMATE" RESULT OF PETITIONER'S CRIME

Because petitioner "harmed" Amy, the remaining question is how much restitution Amy is entitled to receive from him under a mandatory restitution statute. Petitioner takes the position that Amy should receive nothing from him because restitution under Section 2259 "must be limited to harms a defendant proximately caused." Pet. Br. 48. The Government also reads a general proximate cause limitation into

the statute, although it ultimately argues that "the proximate-cause limitation poses no difficulty in restitution requests of the sort at issue here." Gov't Br. 27. At least with respect to petitioner's sweeping claim, Amy takes a different view. As the Fifth Circuit properly recognized below, courts lack any basis for inserting into Section 2259 limiting words that Congress chose not to place there.

A. Subsection 2259(b)(3)'s Plain Language Does Not Contain a General Proximate Cause Requirement

Because this case revolves around a statute, the Court must "begin by analyzing the statutory language, assum[ing] that the ordinary meaning of that language accurately expresses the legislative purpose." *Hardt v. Reliance Standard Life Ins. Co.*, 130 S.Ct. 2149, 2156 (2010) (internal quotation omitted). Section 2259 provides that the district court "*shall* direct the defendant to pay the victim (through the appropriate court mechanism) the *full amount* of the victim's losses. . . ." 18 U.S.C. 2259(b)(1) (emphases added). The statute then goes on to list six categories that are included in these losses. Only the last of these six categories requires a victim to establish the loss was the "proximate result of the [defendant's] offense":

> (3) Definition.—For purposes of this subsection, the term "full amount of the victim's losses" includes **any** costs incurred by the victim for—

> (A) medical services relating to physical, psychiatric, or psychological care;
>
> (B) physical and occupational therapy or rehabilitation;
>
> (C) necessary transportation, temporary housing, and child care expenses;
>
> (D) lost income;
>
> (E) attorneys' fees, as well as other costs incurred; and
>
> (F) **any** other losses *suffered by the victim as a proximate result* of the offense.

18 U.S.C. 2259(b)(3) (emphases added).

The section unambiguously states that a victim must show that a loss was "suffered . . . as the proximate result" of a defendant's offense only when seeking restitution for the "any other losses" covered by Subsection F. "Had Congress wished" to have a general proximate result limitation run throughout the section, "it could have said so." *See Bloate v. United States*, 559 U.S. 196, 211 n.13 (2010) (refusing to apply limitation found in 18 U.S.C. 3161(h)(7) to 3161(h)(1)). Congress could have easily placed the phrase at the beginning of the list of losses or at the very end of the list in a stand-alone clause. Congress did neither. Following the statute's clear text, the court below properly explained that "courts 'ordinarily' should 'resist reading words or elements into a

statute that do not appear on its face.'" J.A. 388 (quoting *Bates v. United States*, 522 U.S. 23, 29 (1997)); *see Dean v. United States*, 556 U.S. 568, 573 (2009).

That Subsection F is indeed separate from Subsections A through E is confirmed not only by the use of separately-lettered subsections, but also by the double appearance of the word "any" (highlighted twice in boldface type above). The first "any" precedes the word "costs," and then Subsections A through E enumerate specific types of recoverable costs. Next, Congress shifts gears, allowing restitution for any "losses," producing a second appearance of "any" in Subsection F and confirming that Congress viewed that subsection as operating separately from the others.

In addition, Section 2259(b)(3) opens with the expansive word "includes," making clear that what follows are simply illustrations of what falls within the "full amount" of restitution that Section 2259(b)(1) extends to child pornography victims. *See Webster's Third New International Dictionary* 1143 (1993) (defining "include" as "to place, list, or rate as a part or component of a whole or of a larger group"). Petitioner overlooks this fact when arguing that restrictive language found in Subsection 2259(b)(3)(F) is then somehow also read back to limit an entirely different provision, Section 2259(b)(1). Congress's restriction on one subsection is not a general restriction on the entire statute. In short, Section 2259(b)(3)'s unambiguous plain language contains a "proximate result" limitation only in Subsection F—end of story.

B. Reading a General Proximate Cause Requirement into Section 2259(b)(3) Would Frustrate Congress's Express Purpose of Assuring Generous Restitution to Child Pornography Victims

Another fundamental reason for not reading a general proximate cause requirement into Section 2259 is that doing so would interfere with Congress's express goals. This Court has repeatedly refused to construe statutes in ways that would "frustrate Congress's manifest purpose." *United States v. Hayes*, 555 U.S. 415, 427 (2009). It is clear that "Section 2259 is phrased in generous terms, in order to compensate the victims of sexual abuse for the care required to address the long term effects of their abuse." *United States v. Laney*, 189 F.3d 954, 966 (9th Cir. 1999). Section 2259 thus interlocks with other laws addressing "a tide of depravity that Congress, expressing the will of our nation, has condemned in the strongest terms." *United States v. Goff*, 501 F.3d 250, 259 (3d Cir. 2007).

Contrary to that express purpose to ensure "full" compensation, petitioner remarkably asks this Court to affirm a district court decision giving Amy no restitution whatsoever. Pet. Br. 67. Petitioner never even attempts to reconcile his interpretation with the statute's goals. Perhaps this is because he is defending a district court decision that candidly conceded that reading a general proximate result requirement into the statute effectively renders it "unworkable." J.A. 296 n.12; *see also United States v. Kennedy*, 643

F.3d 1251, 1266 (9th Cir. 2011) ("[W]e suspect that § 2259's proximate [result] . . . requirement[ ] will continue to present serious obstacles for victims seeking restitution in these sorts of [child pornography] cases."). What makes the statute unworkable, however, is not its text, but rather the additional requirement that courts (like the district court) have read into the statute. As the en banc court below explained in overturning the district court, "Congress intended to afford child victims ample and generous protection and restitution, not to invite judge-made limitations patently at odds with the purpose of the statute." J.A. 391 n.14 (internal quotation omitted).[6]

C. Statutory Construction Principles Confirm that Subsection 2259(b)(3) Does Not Contain a General Proximate Cause Requirement

Because Subsection 2259(b)(3)'s unambiguous text and evident purpose fully coincide, the Court need not resort to other guides to statutory construction. *See Sebelius v. Cloer*, 133 S.Ct. 1886, 1895

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[6] The other parties trumpet the fact that many other circuits have interpreted Section 2259 differently than the Fifth Circuit. But in five of the other circuits (the 1st, 2nd, 6th, 9th, and 11th Circuits), the crime victim was not represented by legal counsel, while the Justice Department joined the defendant in arguing for a general proximate cause requirement. This eliminated the adversarial posture "upon which the court[s] so largely depend[ ] for illumination of difficult" issues. *Baker v. Carr*, 369 U.S. 186, 204 (1962).

(2013). But in any event, the relevant canons of construction all confirm the statute's plain meaning.

Reading the qualifying language in Subsection F back through the five previous subsections plainly violates the well-known canon of statutory construction called "the rule of the last antecedent." 2A N. Singer, *Sutherland on Statutory Construction* 47.33 (7th ed. 2011) ("Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent."). According to this venerable rule, "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it *immediately* follows." *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) (emphasis added); *see also Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 345 (2005). Applying this rule here, the qualifying phrase "suffered by the victim as a proximate result of the offense" applies only to the immediately preceding phrase—"any other losses."[7] Indeed, in *Barnhart*, this Court interpreted a statute containing a qualifying phrase starting with the same two words ("any other") that Subsection 2259(b)(3)(F) contains. This Court should follow *Barnhart* in rejecting the argument that these words somehow imply

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[7] A similar principle supporting this outcome is the "nearest-reasonable-referent canon," which mandates that "[w]hen the syntax involves something other than a parallel series of nouns or verbs, a . . . postpositive modifier normally applies only to the nearest reasonable referent." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 152 (2013).

that the qualifying language that follows should be read throughout the section.[8]

To defeat this "commonsense principle of grammar" (J.A. 375), petitioner and the Government rely on the principle that "[w]hen there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series." Scalia & Garner, *supra*, at 147. For example, in construing the Fourteenth Amendment's prohibition of depriving any person of "life, liberty, or property, without due process of law," the postpositive modifier "without due process of law" can be straightforwardly read to apply, in parallel, to each of the three preceding nouns.

Turning to the statute in this case, no such "straightforward, parallel" construction is possible. Reading the postpositive modifier through each of the six subsections of Section 2259(b)(3) would make the statute read awkwardly and ungrammatically:

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[8] The other parties cite *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726, 733-34 (1973), as providing a competing rule of statutory construction. *Seatrain*, however, simply involved a debate about the meaning of particular words scattered throughout separate parts of a list. *Seatrain* thus properly cited 2 J. Sutherland, *Statutes and Statutory Construction* 4908 (3d ed. 1943), for the familiar canon that associated words bear on one another's meaning (*noscitur a sociis*). 411 U.S. at 734. This canon has no application here, where the meaning of individual words is not in dispute. *See* J.A. 379-80.

(3) Definition.—For purposes of this subsection, the term "full amount of the victim's losses" includes any costs incurred by the victim for—

(A) medical services relating to physical, psychiatric, or psychological care *suffered by the victim as a proximate result of the offense*;

(B) physical and occupational therapy or rehabilitation *suffered by the victim as a proximate result of the offense*;

(C) necessary transportation, temporary housing, and child care expenses *suffered by the victim as a proximate result of the offense*;

(D) lost income *suffered by the victim as a proximate result of the offense*;

(E) attorneys' fees, as well as other costs incurred *suffered* [*sic*] *by the victim as a proximate result of the offense*; and

(F) any other losses suffered by the victim as a proximate result of the offense.

18 U.S.C. 2259(b)(3) (italicized language inserted). This construction makes no sense. For example, the very first subsection would have a crime victim absurdly "suffering" medical services, while the second subsection would have a victim "suffering" therapy or rehabilitation. Similarly jarring is the problem that

comes in Subsection E. Under petitioner's construction, a glaring incongruity develops because Subsection E is finished ungrammatically—i.e., "attorneys' fees . . . incurred suffered [*sic*]. . . ."

In the primary case relied upon by petitioner, the Court could find no reason why certain qualifying language "should not be read as applying to the entire phrase" in the statute at issue. *Porto Rico Ry., Light & Power Co. v. Mor*, 253 U.S. 345, 348 (1920). But in this case, Subsection F's expansiveness provides good reason why Congress added qualifying words there rather than to the five earlier, more precisely-defined subsections:

> As a general proposition, it makes sense that Congress would impose an additional restriction on the catch-all category of "other losses" that does not apply to the defined categories. By construction, Congress knew the kinds of expenses necessary for restitution under subsections A through E; equally definitionally, it could not anticipate what victims would propose under the open-ended subsection F.

J.A. 340. Congress had good reason for thinking Subsection F was potentially far more expansive than the other five subsections. Subsection F allows restitution not for defined, out-of-pocket costs (e.g., the cost of medical care), but rather for ill-defined "losses," 18 U.S.C. 2259(b)(3)(F), including losses for "emotional damages." *See* S. Rep. No. 104-179 at 927 (noting availability of emotional damages); *see also*

p. 20, *supra* (noting that Congress used the word "any" twice in the statute, differentiating the costs outlined in Subsections A through E from the "any" other losses in Subsection F).

The statute's punctuation further confirms that the qualifying language found in Subsection F applies only to Subsection F. As the court below explained, "'the meaning of a statute will typically heed the commands of its punctuation.'" J.A. 454 (quoting *U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of Am.*, 508 U.S. 439, 454 (1993)). Here, Section 2259 "begins with an introductory phrase composed of a noun and verb . . . that feeds into a list of six items, each of which [is an] independent object[] that complete[s] the phrase." J.A. 378. Each completed phrase is separated by semi-colons. As a matter of syntax, a semicolon is typically used to separate "two or more clauses" that are "grammatically complete." William Strunk, Jr., & E.B. White, *The Elements of Style* 5 (4th ed. 2000). As in other parts of criminal law, Congress's use of semi-colons indicates a clear break between each category, because Congress "typically utilizes multiple subsections or separates clauses with semi-colons to enumerate the separate crimes." *United States v. Rigas*, 605 F.3d 194, 209 (3d Cir. 2010). Paralleling this approach signaling separate offenses, Congress signaled distinct restitution categories in Section 2259(b)(3) by individually enumerating six subsections and then further separating them with semi-colons. *See Bloate,* 559 U.S. at 204-08 (holding that, in interpreting statute with introductory clause

followed by a dash and then separately enumerated subsections followed by semi-colons, language in one subsection does not carry over into another).

Finally, another parallel principle of statutory construction—the scope of subparts canon—supports the same conclusion. Ordinarily statutory "[m]aterial within an indented subpart relates only to the subpart." Scalia & Garner, *supra*, at 156. Here, Congress made Subsection F an indented subpart of a larger statute.[9] In other words, what happens in Subsection 2259(b)(3)(F) stays in Subsection 2259(b)(3)(F).

D. The Surrounding Statutory Context Confirms that Section 2259(b)(3) Does Not Contain a General Proximate Cause Requirement

When Congress wanted to include a general proximate cause requirement in a restitution statute, it knew how to draft such a requirement. The omnibus 1994 Violent Crime Control and Law Enforcement Act of 1994 (VCCLEA) contained not only the child pornography restitution provision at issue here—Section 2259 (found at Pub. L. No. 103-322, 40113, 108 Stat. 1907 (1994))[10]—but also a restitution provision for telemarketing fraud victims—18 U.S.C.

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[9] This indentation was part of the text Congress enacted. *See* App. 41.

[10] The Violence Against Women Act (VAWA) containing Section 2259 was a separate title within the larger VCCLEA.

2327 (found at *id.*, 250002(a)(2), 108 Stat. 2082 (1994)). With striking similarity to Section 2259, Section 2327 mandates restitution in telemarketing fraud cases for the "full amount of the victim's losses." 18 U.S.C. 2327. But unlike the child pornography restitution statute, Section 2327 *does* contain a general proximate result requirement. The statute provides: "For purposes of this subsection, the term 'full amount of the victim's losses' means *all losses suffered by the victim as a proximate result of the offense*." 18 U.S.C. 2327(b)(3) (emphasis added).

This variation among statutes demonstrates that if Congress truly wanted to impose a general "proximate result" requirement on Section 2259, it could have drafted a much shorter version of the full-amount-of-the-victim's-losses clause, exactly as it did when it simultaneously enacted the telemarketing fraud restitution provision. If Congress meant to limit child pornography victims to "losses suffered as a proximate result of the offense," there was no need to delineate six different categories of losses in Subsections A through F. All that was necessary was the much shorter (27-word) formulation used in the telemarketing fraud provision.

Further underscoring the general proximate cause requirement in the telemarketing fraud statute, its definition of "victim" cross-references Subsection 3663A(a)(2), which in turn defines "victim" as an individual "*directly and proximately* harmed as a result of" the commission of a specified federal crime.

See 18 U.S.C. 2327(c) (emphasis added) (cross-referencing 18 U.S.C. 3663A(a)(2)). In contrast, as already explained (*see* pp. 14-15, *supra*), in Section 2259 Congress defined child pornography victims more broadly, omitting the limiting words "directly and proximately." Unsurprisingly, Congress employed different words purposely: it wanted more generous restitution for victims of child pornography—a sex offense often directed against children—than for victims of telemarketing fraud—an economic offense often directed against adults.

E. The Drafting History Demonstrates that Congress Considered—and Rejected—the Idea of Placing a "Proximate Result" Limitation into Other Subsections of Parallel Restitution Statutes

Section 2259's drafting history demonstrates that members of Congress specifically considered—and rejected—the idea of placing a "proximate result" limitation into other subsections of the statute. When the Senate began developing the Violence Against Women Act in 1990, it considered restitution statutes for sexual assault and domestic violence victims that would have provided a specific "proximate result" limitation in two of the subsections:

> (2) For purposes of this subsection, the term "full amount of the victim's losses" includes any costs incurred by the victim for—

> (A) medical services relating to physical, psychiatric, or psychological care;
>
> (B) physical and occupational therapy or rehabilitation;
>
> (C) any income lost by the victim *as a proximate result of the offense*;
>
> (D) attorneys' fees; and
>
> (E) any other losses suffered by the victim *as a proximate result of the offense.*

S. Rep. No. 101-545 at 4, App. 33 (emphases added) (covering sexual assault restitution); *see also id.* at 16-17, App. 37 (an essentially identical provision for domestic violence).

During the legislative process the following year, 1991, the "proximate result" limitation was removed from Subsection C in the sexual assault and domestic violence provisions, but left in the last subsection. *See* S. Rep. No. 102-197 at 4, 18-19. As a result, when the Senate first considered a restitution provision for child pornography victims in 1993, it used as the model for Section 2259 the formulation from the sexual assault and domestic violence provisions then under active consideration. *See* S. Rep. No. 103-138 at 5-6 (1993). This sequence makes it clear that the Fifth Circuit was correct when it recognized that the "selective inclusion and omission of causal requirements in § 2259's subsections" was no accident but rather suggestive of Congress's conscious decision "to

depart from, rather than incorporate, a tradition of generalized proximate cause." J.A. 389-90. In light of that history, this Court should respect Congress's choice and apply a "proximate result" limitation only where Congress has provided one.[11]

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[11] Other legislative history also supports Amy's interpretation. *See, e.g.*, S. Rep. No. 103-138 at 56 (describing Section 2259 as a statute that "reverses those assumptions [that defendants lack resources to pay restitution], *requiring the court to order the defendant to pay the victim's expenses*" (emphasis added)).

Petitioner, on the other hand, points to a single sentence (in a Senate Judiciary Committee report from an earlier session of Congress) that provides a shorthand overview of Section 2259's provisions. Pet. Br. 38 (quoting S. Rep. No. 103-138 (1993) ("This section requires sex offenders to pay costs incurred by victims as a proximate result of a sex crime."). In such a summary, "precision of meaning is naturally and knowingly sacrificed in the interest of brevity." *Kosak v. United States*, 465 U.S. 848, 865 (1984) (Stevens, J., dissenting). Moreover, Amy's position is (consistent with this sentence) that the statute requires defendants to pay costs victims incur as a proximate result of a sex crime—under Subsection F, the most expansive part of the statute. She simply believes that the statute provides for the recovery of other costs as well. The sentence simply does not discuss these additional costs.

Petitioner also mistakenly points to legislative history involving an entirely different statute. *See* Pet. Br. 38 (citing S. Rep. No. 104-179 at 29-30 [*sic*—should be 19] (mistakenly discussing the legislative history for 18 U.S.C. 3663A). Nothing in these snippets supports ignoring Section 2259's plain language.

F. Neither the Constitution's Prohibition of Excessive "Fines" Nor the Rule of Lenity Provides Any Basis for Narrowly Construing Section 2259

Unable to find much else to support his position, petitioner argues that it violates the Eighth Amendment's prohibition of "excessive fines" to allow child pornography victims to recover full restitution. Petitioner concedes that this "Court has never actually applied the Excessive Fines Clause to criminal restitution." Pet. Br. at 58. Presumably this is because a "fine" is a "pecuniary criminal punishment or civil penalty payable to the public treasury." *Black's Law Dictionary* 664 (8th ed. 2004); *see United States v. Bajakajian*, 524 U.S. 321, 327-28 (1998). Conversely, a restitution award under Section 2259 is payable to the crime victim as compensation for her losses and thus is not a criminal penalty to which the Eighth Amendment even applies. J.A. 397.[12]

Even if the Constitution's prohibition on excessive "fines" could somehow be contorted to apply to this case, a fine is only excessive if "it is grossly

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[12] Petitioner relies on *Kelly v. Robinson*, 479 U.S. 36 (1986), for the proposition that restitution awards have penal aspects. But *Kelly* involved an older restitution statute that was not tailored to victims' losses, *id.* at 53, and did not give the victim any right to restitution, *id.* at 52. Section 2259, in contrast, mandates an award calculated with reference to a victim's losses, 18 U.S.C. 2259(b)(3), and the 2004 Crime Victims' Rights Act now promises victims that they have the "right to full and timely restitution. . . ." 18 U.S.C. 3771(a)(6).

disproportional to the gravity of a defendant's offense." *Bajakajian*, 524 U.S. at 334. Given petitioner's indigency, the district court will likely place him on a payment schedule which will only require him to pay (at most) a few hundred dollars a month—hardly an excessive payment for a serious felony involving harm to sexually abused children. *See United States v. Reingold*, 731 F.3d at 216-18.

Nor does the Court have any reason to apply the rule of lenity. That rule applies only when punishment is at stake—i.e., when an inaccurate statutory interpretation could result in "men languishing in prison" without congressional authorization, *United States v. Bass*, 404 U.S. 336, 348 (1971) (internal quotation omitted)—not when the issue is how to construe a compensatory restitution statute.[13] In any event, "the rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute such that the Court must simply guess as to what Congress intended." *Maracich v. Spears*, 133 S.Ct. 2191, 2209 (2013) (internal quotation omitted). The Court has no reason to guess here: Congress clearly intended for child pornography victims to

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[13] This case is thus unlike *United States v. Burrage*, No. 12-715, in which the Court is considering what evidence the Government must supply to prove a defendant guilty beyond a reasonable doubt under a statute creating criminal liability if death "results from the use of [a controlled] substance" trafficked by that defendant.

receive restitution for the "full amount" of their losses.

G. Conventional Tort Principles Exclude Intentional Tortfeasors from Standard Proximate Cause Protections

Petitioner's argument for reading a general proximate cause limitation into Section 2259 ultimately relies not on carefully reading the statute, but on applying tort theory. Of course, courts must enforce Congress's chosen words, even when so doing breaks with past approaches. *See, e.g., CSX Transp., Inc. v. McBride*, 131 S.Ct. 2630, 2638 (2011). But here, no conflict exists, since the Fifth Circuit's interpretation of the statute coincides perfectly with conventional tort law. Petitioner goes astray in looking to tort principles that limit liability for *negligent* tortfeasors while failing to recognize that Section 2259 imposes restitution obligations on *intentional* "tortfeasors"—i.e., guilty felons, for whom broad liability is always the rule. *See generally* Paul G. Cassell et al., *The Case for Full Restitution for Child Pornography Victims*, 82 Geo. Wash. L. Rev. 61 (2013).

In citing various tort law treatises, petitioner turns to the wrong pages. He recites passages about *negligent* tortfeasors, overlooking that for *intentional* tortfeasors "[m]ore liberal rules are applied as to the consequences for which the defendant will be held liable, the certainty of proof required, and the type of damage for which recovery is to be permitted. . . ." W. Page Keeton et al., *Prosser and Keeton on the Law of*

Torts 37 (5th ed. 1984) (hereinafter *Prosser & Keeton*). Victims of intentional torts generally do not have to establish a standard proximate cause nexus because "[a]n inquiry into proximate cause has traditionally been deemed unnecessary in suits against intentional tortfeasors." *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 547-48 (1983) (Marshall, J., dissenting) (citations omitted). Prosser and Keeton agree that "[f]or an intended injury the law is astute to discover even very remote causation." *Prosser & Keeton*, *supra*, at 37 n.27 (internal quotation omitted). Reiterating these general principles, the *Restatement (Third) of Torts* explains that "[a]n actor who intentionally or recklessly causes harm is subject to liability for a broader range of harms than the harms for which that actor would be liable if only acting negligently." *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* 33 (2010) (hereinafter "*Restatement (Third): Harms*"). The comment to this section explains that the "standard provided in 29 [the section addressing what the other parties call 'proximate cause'] is inadequate to provide appropriate limits on the scope of liability for intentional and reckless tortfeasors." *Id.* 33 cmt. a.

To the extent this Court is going to construe Section 2259 as a tort-like statute, the applicable principles come from intentional torts, not negligent acts. Congress crafted Section 2259 by copying language directly from the restitution statutes for sexual assault (Section 2248) and domestic violence (Section 2264). *See* p. 31, *supra*. These statutes impose

restitution for violent crimes that involve physical invasions of their victims' bodily integrity—obvious intentional torts.

Section 2259 likewise provides restitution for intentional torts. It provides restitution for Chapter 110 offenses such as the sexual exploitation of children (Section 2251), selling children (Section 2251A), and distribution, receipt, and possession of child pornography (Section 2252 and Section 2252A). These crimes are all felonies containing mens rea requirements that a defendant must have acted (at least) "knowingly." *See, e.g.*, 18 U.S.C. 2252(a)(4)(B) (forbidding "knowingly" possessing child pornography). These child pornography *crimes* are thus like intentional torts, including well-established invasion of privacy torts. *See, e.g., Restatement (Second) of Torts* 652B (1977) (intentional invasion of seclusion); *id.* 652D (intentional invasion of privacy); *Restatement (Third): Harms* 46 (intentional infliction of emotional distress). Accordingly, construing Section 2259 as extending liability more broadly for child pornography crimes than standard proximate cause principles would for non-intentional acts is consistent with, not a departure from, conventional tort theory.

IV. AMY CAN RECOVER THE "FULL AMOUNT" OF HER LOSSES FROM PETITIONER UNDER A SYSTEM OF JOINT AND SEVERAL LIABILITY

Amy has spent considerable time explaining why Congress omitted a general proximate result

requirement from Section 2259 because this conclusion straightforwardly answers the causal question before the Court. As the Fifth Circuit recognized, with this conclusion in mind, the rest of the restitution statute falls neatly into place. Contrary to the petitioner's claims, Section 2259 does not impose infinite restitution liability on convicted criminals, but rather restricts liability through a three-step process. This process requires, first, a finding of "harm" caused by a defendant's crime, then a calculation of the "full amount" of the child pornography losses collectively caused by a defendant and other criminals, and finally a determination of the defendant's ability to pay. Such an approach creates joint and several liability for intentional wrongdoers (i.e., child pornography felons) that is entirely consistent with standard tort law.

A. The Fifth Circuit Properly Held that Section 2259 Creates a Three-Step Process for Determining Restitution in Child Pornography Cases

This Court recently considered a statute like Section 2259 in which Congress eschewed hard-to-define proximate cause principles. *CSX Transportation, Inc. v. McBride*, 131 S.Ct. 2630 (2011), held that the Federal Employers' Liability Act (FELA) does not incorporate traditional proximate cause standards developed in non-statutory, common-law tort actions. In enacting FELA, Congress had "remedial goals" in mind for addressing the serious injuries of railroad

workers, *id.* at 2636, and put in place a causation standard that was "relaxed" compared to common-law tort principles. *Id.* at 2636-37. Specifically, avoiding the "dialectical subtleties" (*id.* at 2641) that would be involved in requiring workers to prove that their injuries proximately resulted from a railroad's negligence, Congress broadly allowed recovery where "the railroad's negligence played a part—no matter how small—in bringing about the injury." *Id.* at 2644.

As properly construed by the Fifth Circuit, Section 2259 operates much like FELA, although liability remains more restricted than for railroad employers. In rejecting a similar argument for reading a proximate result limitation into the FELA statute, this Court explained that limitless liability is avoided by "FELA's limitations on *who* may sue, and *for what*. . . ." 131 S.Ct. at 2644 (emphases added). Section 2259 has the same limitations; indeed, its limitations are even more stringent.

First, with regard to *who* can seek restitution, Section 2259 restricts a defendant's liability to his particular victims—i.e., those whom he criminally harmed. Under the Fifth Circuit's interpretation, "the district court must [initially] determine whether a person seeking restitution is a crime victim under § 2259—that is, 'the individual harmed as a result of a commission of a crime under this chapter.'" J.A. 400 (quoting 18 U.S.C. 2259(c)). As Amy explained earlier (*see* pp. 13-17, *supra*), this limitation requires an

"individual"[14] seeking restitution to demonstrate a cause-in-fact connection between harm she suffered and an individual defendant's crime.

This "victim" limitation establishes foreseeability, an important element that a proximate cause limitation would otherwise need to fulfill. *See CSX Transp.*, 131 S.Ct. at 2651 (Roberts, C.J., dissenting). Indeed, foreseeability here is far more obvious than in cases (such as FELA cases) involving mere negligence. Child pornography crimes cover defendants who act "knowingly" with regard to possessing images depicting the sexual abuse of children. *See, e.g.*, 18 U.S.C. 2252(b)(4)(B). And "every adult who watches videos of young girls being raped should reasonably foresee that he is inflicting great harm upon those victims." *United States v. Gamble*, 709 F.3d 541, 557 (6th Cir. 2013).

Second, concerning *what* kinds of losses are recoverable as child pornography restitution, Congress

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[14] Section 2259 limits those who can seek restitution to "individuals," i.e., human beings who were harmed by the production, distribution, or possession of child pornography. *See Mohamad v. Palestinian Authority*, 132 S.Ct. 1702, 1707 (2012) ("individual" typically means a "natural person"). In contrast, in more broadly applicable restitution statutes, Congress defined a "victim" as a "person"—thereby opening up restitution to organizations and the Government itself. *See* 1 U.S.C. 1; *see, e.g., United States v. Schmidt*, 675 F.3d 1164, 1169 (8th Cir. 2012). The Government overlooks this point in suggesting that the Fifth Circuit's interpretation might allow corporate employers to obtain restitution. *See* Gov't Br. 33.

identified six categories. Five of these involve easily-quantifiable costs commonly awarded as restitution: e.g., expenses for psychological care and lost income. The sixth category is more open-ended: "any other losses." This category (and only this category) is circumscribed by the limitation that the losses must be "suffered by the victim as a proximate result" of the defendant's offense. 18 U.S.C. 2259(b)(3)(F). Amy has not requested restitution for losses under the open-ended Subsection F.[15]

Third and finally, it is important to remember that once the district court determines "victim" status and the full amount of the victim's losses, it must then turn to "establishing a payment schedule that corresponds to the defendant's ability to pay." J.A. 399. For indigent defendants (who probably comprise the majority of child pornography defendants, *see Sentencing Comm'n Report to Congress*, *supra*, at 162), the payment schedule will be modest. For instance, the indigent defendant in the companion case (Michael Wright) was ordered to pay just $200 per month in restitution upon release from prison.

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[15] The Government claims that without a "proximate result" limitation, "remote" victims might seek restitution. Gov't Br. 33. It offers the hypothetical of a child pornography collector's computer transmitting a computer virus which damages another person's computer. *Id.* (internal quotation omitted). But because such a restitution claim would involve losses falling within Subsection F's "any other" category, any purported "victim" seeking restitution for such losses would already have to prove proximate causation.

J.A. 399. This final step ensures that no defendant will be required to pay more than is reasonable toward a victim's losses.

Petitioner fails to present any substantial argument that district courts are somehow unable to calculate restitution under this three-step approach. Instead, he relies on tort theory to argue that in order to receive any restitution, Amy must present "some evidence . . . that shows that 'but for' [his crime], the losses or damages would not have occurred." Pet. Br. 49. As the Government properly explains in some detail (Gov't Br. 19-27), petitioner takes too narrow a view of the kind of causation Congress required. *Cf. Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S.Ct. 2517, 2546 (2013) (Ginsburg, J., dissenting) (noting that "[w]hen more than one factor contributes to a plaintiff's injury, but-for causation is problematic" and that in those instances "other causation formulations" are more appropriate).

The conundrum of multiple wrongdoers who jointly cause injury was solved long ago by American courts, which have looked to the harm caused by wrongdoers not individually but in the aggregate. As a leading tort treatise explains, "[w]hen the conduct of two or more actors is so related to an event that their combined conduct, viewed as a whole, is a but-for cause of the event, and application of the but-for rule to them individually would absolve all of them, the conduct of each is a cause in fact of the event." *Prosser & Keeton*, *supra*, at 268. American law generally takes this view because a victim should not be "worse off due to multiple tortfeasors than would

have been the case if only one of the tortfeasors had existed." *Restatement (Third): Harms*, *supra*, 27 cmt. c, at 378; *see also id.* 27 Reporter's Note cmt. i, at 395 (the position that multiple, minimal causes fail to create tort liability is "obviously untenable"); Richard W. Wright, *Causation in Tort Law*, 73 Calif. L. Rev. 1735, 1792 (1984) (in joint harm situations, courts have traditionally "allowed the plaintiff to recover from each defendant who contributed to the [harm] that caused the injury, even though none of the defendants' individual contributions was either necessary or sufficient by itself for the occurrence of the injury") (collecting cases). The standard solution to the problem of liability of multiple wrongdoers is asking whether a particular actor's action was part of a "sufficient causal set" for the occurrence of the harm. *Restatement (Third): Harms* § 27 cmt. f; Wright, *supra*, at 1788-1803. Any wrongdoer who is part of such a "set" is a contributing cause and is liable.

Petitioner is part of such a set, as he appears to implicitly concede. Petitioner acknowledges that "Amy's profound suffering is due in large part to her knowledge that each day, untold numbers of people across the world are viewing and distributing images of her sexual abuse." Pet. Br. 50. Of course, the "untold numbers" he is alluding to include him. Petitioner cannot escape his responsibility to pay restitution by hiding in a crowd.

Nor can petitioner hide behind proximate cause principles to avoid responsibility. On this point both

Amy and the Government agree, although they take different paths to the same destination. The Government reads a "proximate cause" limitation into Section 2259, but concludes that Amy meets it: "proximate cause is a policy judgment about where to draw the line in a potentially limitless causal chain. Whatever difficulties may arise at the margins, restitution requests like Amy's fall comfortably within any reasonable causal limit." Gov't Br. 37. Amy's conclusion is the same, but she takes a more straightforward route. Congress has simply identified five kinds of losses that it deems to be—automatically—the proximate result of a defendant's child pornography crime.

Traditionally, a "proximate" connection requires a "causal connection between the wrong and the injury that is not so tenuous that what is claimed to be consequence is only fortuity." *CSX Transp.*, 131 S.Ct. at 2645-46 (Roberts, C.J., dissenting). In Section 2259, Congress determined that, for child pornography victims, expenses for subsequent psychological care (for example) are not a fortuity, but rather an entirely predictable result—so predictable that argument about whether they "proximately" resulted from an individual defendant's crime is unnecessary. At the end of the day, "the phrase 'proximate cause' is shorthand for the policy-based judgment" about where to draw a line on liability. *CSX Transp.*, 131 S.Ct. at 2642 (plurality opinion). For restitution purposes, Congress simply and expressly placed inside the liability line

all costs from child pornography enumerated in 18 U.S.C. 2259(b)(3)(A) through (E).

It is hardly surprising that Congress eschewed the phrase "proximate result" to accomplish its objective. The corollary phrase, "proximate cause," is so "notoriously confusing" that "the drafters of the *Restatement (Third) of Torts* avoided the term altogether." *CSX Transp.*, 131 S.Ct. at 2642 (plurality opinion). Instead of asking whether harms were proximately caused, the *Restatement* asks whether harms "result[ed] from the risks that made the actor's conduct tortious." *Restatement (Third): Harms*, *supra*, at 29. Here, psychological injury producing the need for psychological care is exactly the kind of harm that makes possessing child pornography not only tortious, but criminal.

The courts of appeals around the country have consistently identified the pool of child pornography losses for which Amy seeks "full" restitution (although they have debated how to divide these losses among various defendants). The Government, however, claims that unless proximate cause limits Amy's losses, she might be able to recover such things as medical expenses for a car accident while driving to her therapist's office. Gov't Br. 33. Amy agrees with the Government that Congress did not intend to cover such losses. But it is unnecessary to read a "proximate result" limitation into the statute to exclude them. The Fifth Circuit specifically stated that it was *not* allowing restitution for such attenuated losses. J.A. 385 n.12.

As with "many questions of statutory interpretation, the issue here is not the meaning of the words. . . . Rather, the issue is the statute's scope." *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 243 (2008) (Breyer, J., dissenting). The scope of this restitution statute is child pornography crimes—the offenses covered by Chapter 110 into which Congress placed Section 2259. This limitation is made clear by the statute's wording, which mandates restitution for such things as psychological "care" and "lost" income. 18 U.S.C. 2259(b)(3)(A) & (D). These words contextually and inferentially require a nexus for why "care" is needed or why income was "lost—i.e., child pornography crimes. As explained earlier, *see* p. 20, *supra*, the statute's plain language makes clear that the items Congress specifically listed in Subsections A through E are simply illustrations of some larger pool of losses—they are "include[d]" in the "full amount" of losses that victims will recover. 18 U.S.C. 2259(b)(3). That full amount thus encompasses a victim's losses from all child pornography crimes.

B. The Fifth Circuit Properly Held that Section 2259 Creates a Workable System of Joint and Several Liability for Child Pornography Criminals

The Fifth Circuit's three-step process effectively creates a system of joint and several liability for criminals convicted of child pornography production, distribution, and possession. They all become jointly

and severally liable for the losses that they collectively impose on victims such as Amy. This is what Congress meant by requiring each defendant to pay restitution for "the full amount" of a victim's losses.

Petitioner contends that this commonsense approach will create a "procedural nightmare." Pet. Br. 54. His argument, however, lacks any real world examples of problems that have arisen in the Fifth Circuit during the past year when joint and several liability has been in place. Instead, he can only posit that, theoretically, court administrators will have difficulty tracking restitution awards across multiple judicial districts. *Id.* This, however, will be an issue under *any* approach that awards Amy *any* restitution in multiple cases. Unless petitioner is suggesting that this Court should completely gut Section 2259 by preventing child pornography victims from receiving any recovery whatsoever, tracking restitution awards will be an issue.

If anything, petitioner's interpretation would create more procedural problems than the Fifth Circuit's. He is apparently proposing that district courts award restitution based on "each defendant's proportional share of the harm." Pet. Br. 57. This approach, however, has all the same accounting difficulties, with the added problem that the district court judge must somehow make an additional determination concerning each defendant's "proportional share" of Amy's losses.

In any event, petitioner overstates the accounting issue. As required by rules of professional conduct, Amy's attorney keeps meticulous records of the restitution payments he receives for Amy (and provides these records to defense counsel and judges upon request). Likewise, the Justice Department has a database monitoring restitution awards in child pornography cases. J.A. 396 n.19. Additionally, restitution judgments and payments are public records available in courthouses around the country. While accounting questions may arise, they hardly provide a reason to ignore Congress's command for "mandatory" restitution for the "full amount" of Amy's losses.

Joint and several liability is also supported by a separate procedural statute, 18 U.S.C. 3664. While Section 2259 is a stand-alone, substantive statute that describes the method for determining the amount of restitution owed to child pornography victims, it cross-references Section 3664 for procedures on how restitution orders are to be "issued and enforced." *See* 18 U.S.C. 2259(b)(2) ("An order of restitution under this section shall be *issued and enforced* in accordance with section 3664. . . ." (emphasis added)). A provision in Section 3664 allows a district court to enforce a restitution award "by all other available or reasonable means," 18 U.S.C. 3664(m) (discussed in J.A. 391-92), giving the district

courts the power to take whatever steps necessary to apply joint and several liability.[16]

Indeed, another provision in Section 3664—3664(h)—very specifically endorses joint and several liability when multiple defendants appear for sentencing at the same time before a district court: "If the court finds more than 1 defendant has contributed to the loss of a victim, the court *may make each defendant liable for payment of the full amount of restitution* or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant." 18 U.S.C. 3664(h) (emphasis added). To be sure, Section 3664(h) does not, by itself, *require* joint and several liability for multiple defendants

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[16] Because Section 2259 specifically directs that district courts are to use Section 3664 only on questions of "issu[ing] and enforce[ing]" child pornography restitution awards, it would be improper to interpret Section 3664 as somehow superseding Section 2259's requirements on the antecedent question of calculating the size of such an award. Petitioner overlooks this fact when claiming that Section 3664(e)'s general requirement that the Government bears the "burden of demonstrating the amount of the loss sustained by a victim as a result of the offense" somehow reduces the size of Section 2259 awards. Pet. Br. 24. Moreover, Section 3664(e)'s reference to "amount of the loss" links directly to the general restitution statute, which requires a district court to consider, as part of a discretionary restitution decision, "the amount of the loss sustained by each victim as a result of the offense." 18 U.S.C. 3663(a)(1)(B)(i)(I)). This reference then does not link to the differently-worded provision in Subsection 2259(b)(1), which mandates restitution for the "full amount" of the victim's losses.

sentenced before different courts at different times. *See* Gov't Br. 43-44 (noting that Section 3664(h) seemingly refers to multiple "defendants" before the court for sentencing at one time). But as the Fifth Circuit cogently recognized, "nothing in Section 3664 forbids [joint and several liability], either expressly or through implication; the fact that [joint and several liability] conforms well to this context supports its application." J.A. 394.

Even more important, Section 3664(h) directly confirms that Congress understood that apportioning liability among multiple defendants who "contributed to the loss of a victim" was different from awarding restitution for the "full amount" of a victim's losses. Congress permitted such apportionment only in the very narrow circumstance where a court had multiple defendants before it at sentencing and thus could make sure that, collectively, they made the victim whole. To allow district courts to apportion in other circumstances would radically shrink victims' restitution awards and eviscerate the congressional promise to child pornography victims that they will always receive restitution for the "full amount" of their losses. 18 U.S.C. 2259(b)(1).

If Amy succeeds in recovering all her losses, she will no longer spend time seeking new restitution orders. This fact alone is enough to reject petitioner's dubious claim that district courts will somehow still be obligated to enter duplicative restitution orders. *See* Pet. Br. 51-54. Moreover, if true, his claim would also apply to his own interpretation of Section 2259.

Perhaps petitioner's real point here is that, under his interpretation of the statute, the risk of possible overpayment can be avoided by always requiring underpayment—a strange way to interpret a statute promising victims restitution for the "full amount" of their losses. In any event, district courts are always authorized to establish or modify a restitution payment schedule. 18 U.S.C. 3664(f) & (k). For a restitution obligation that was previously satisfied, the appropriate schedule would be $0, since the victim no longer has any compensable "losses." J.A. 394-95.

If anything, the provision petitioner relies upon supports Amy's position. Section 2259(b)(4)(B)(ii) forbids courts from reducing a restitution award because a victim has "receive[d] compensation for his or her injuries from the proceeds of insurance or any other source." Assuming (as petitioner does) that this language prevents district courts from considering restitution awards against other child pornography defendants, then "full" restitution for a victim can only come from the single defendant before the sentencing judge—and an award for full restitution is always appropriate.

C. The Fifth Circuit's Interpretation Tracks Conventional Tort Principles by Imposing Joint and Several Liability on Intentional Tortfeasors Who Collectively Harm Amy

In rejecting joint and several liability, the other parties claim that conventional tort law principles

support an allocation of Amy's losses across some unspecified number of wrongdoers. Petitioner claims that this requirement comes from reading general tort law principles into the statute. Pet. Br. 49-50. The Government also supports apportionment, although the source of the Government's requirement is unclear. The Government declares tersely that joint and several liability "is not required by the statute" (Gov't Br. 42), without pointing to any language supporting its position. Ironically, while its prosecutors zealously pursue lengthy prison terms for child pornography defendants, when it comes to restitution the Government worries that ordering those same defendants to pay full compensation to their victims "may be unduly harsh." Gov't Br. 42.

The other parties' single-minded focus on apportionment seems to stem from the belief that full liability is somehow "disproportionate" to a defendant's crime. *See* Pet. Br. 66; Gov't Br. 46. But unlike punishment under the criminal law, compensation under tort law is never proportionate to culpability. A few seconds of inattentive driving can lead to a multi-million dollar wrongful death judgment. A small tap on an eggshell plaintiff can cause a skull to collapse with huge liability. The overarching tort rule is that a wrongdoer takes his victim as he finds her. *Restatement (Third): Harms*, *supra*, at 31. It would be perverse to deviate from that rule here where the alleged lack of "proportionality" stems from the fact that Amy has suffered large losses.

Apportionment has recently crept into some parts of tort law through a controversial "tort reform" movement, which has led some states to replace joint and several (i.e., full individual) liability for ordinary tortfeasors with individually allocated fractional liability for some types of harm caused by ordinary tortfeasors. *See* Richard W. Wright, *The Logic and Fairness of Joint and Several Liability*, 23 Memphis U.L. Rev. 45, 49 (1992) (noting and criticizing these efforts); cf. *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135, 163 (2003) (noting "this Court's repeated statements that joint and several liability is the traditional rule"). When Congress drafted Section 2259 in the early 1990s, the *Restatement (Second) of Torts* described American tort law as not providing apportionment for joint and several (i.e., full individual) liability. *Restatement (Second) of Torts* 875 (1979). The current *Restatement* takes no position on this issue because "there is currently no majority rule." *Restatement (Third) of Torts: Apportionment of Liability* 17 cmt. a (2000) (hereinafter *Restatement (Third): Apportionment*). But while some jurisdictions have recently made changes to reduce the liability of merely negligent tortfeasors, the new *Restatement* reports that "there is, so far as we are aware, *no authority whatsoever* for exempting *intentional* tortfeasors from joint and several liability." *Id.* at 12, at 113 (emphases added). It is generally accepted that "[i]ntentional tortfeasors have been held jointly and severally liable since at least the decision in *Merryweather v. Nixan*, 8 Term Rep. 186, 101 Eng. Rep. 1337 (1799). . . ." *Restatement (Third): Apportionment*

12, Reporters' Note cmt. b at 111. This view continues today, as "[n]ot a single appellate decision has been found that stands for the proposition that joint and several liability of intentional tortfeasors has been abrogated or modified." *Id.* at 113. *See, e.g., Smith v. Islamic Emirate of Afghanistan*, 262 F. Supp. 2d 217, 233 (S.D.N.Y. 2003) (considering suit by surviving family members of victims of the 9/11 terrorist attacks against Al Qaeda, the Taliban, and Osama bin Laden; while New York's new tort rule requires apportionment, "this rule is inapplicable where, as here, the [tortious] actions require intent").

Conventional tort principles for intentional tortfeasors are well illustrated by Professors Harper and James, who give the example of "several ruffians [who] set upon a man and beat him, each inflicting separate wounds." Under traditional tort doctrine, the ruffians—intentional tortfeasors—are each "liable for the whole injury." 2 Fowler Harper & Fleming James, *The Law of Torts* 1124 (1956) (hereinafter *Harper & James*). Amy is the 21st century victim of these hypothetical attackers. She is "set upon" by digital "ruffians" who are all harming her. Even if her psychological wounds can somehow be viewed as "separate," conventional tort law demands that all the ruffians be held liable for her "whole injury."

The Harper and James hypothetical has a very clear real-world parallel, as this Court's decision interpreting Section 2259 will apply to the almost word-for-word identical Section 2248. Enacted as part of the Violence Against Women Act on the same day

as Section 2259, *see* p. 28, *supra*, Section 2248 governs restitution for sexual assaults occurring within federal jurisdiction. The provision thus covers federal crimes involving multiple physical injuries: gang rapes and serial rapes. Consider the case of a victim gang raped by five men on one night or by five men on five sequential nights. The victim then requires medical and psychological care. If the other parties' allocation approach is applied to these crimes, courts will be limited to awarding restitution for each defendant's "proportional share of the harm" (Pet. Br. 57) or his "relative contribution" to the injuries (Gov't Br. 48). This would not only be highly impracticable and intrusive to the victim, but it would invite a "tortfest" because each man could reduce his restitution liability by encouraging other men to join in and rape the victim. *See* Wright, *The Logic and Fairness of Joint and Several Liability*, *supra*, at 57. Such an approach would be morally reprehensible. Moreover, what if law enforcement is able to apprehend only one of the five rapists? On an apportionment theory, the victim would only receive restitution for 20% of her losses, rather than the "full amount" promised by Congress. Congress avoided such difficulties by simply commanding that sexual abusers within federal jurisdiction must pay the "full amount" of their victim's losses. 18 U.S.C. 2248(b)(3).

Like the gang of ruffians or the gang rapists, petitioner here has joined a de facto joint criminal enterprise which connects child pornography producers, distributors, and possessors. *See* pp. 9-13, *supra*.

Under the common law approach for such joint enterprises, "the act of one is the act of all, and liability for all that is done is visited upon each." *Prosser & Keeton*, *supra*, at 346. Petitioner does not need to formally conspire with other persons. Instead, "if one person acts to produce injury with full knowledge that others are acting in a similar manner and that his conduct will contribute to produce a single harm, a joint tort has been consummated even when there is no prearranged plan." 1 *Harper & James*, *supra*, at 699. As a joint tortfeasor, petitioner is then liable to pay for "the entire harm," *see id.* at 698 & 1124, or, as Section 2259 puts it, to pay for the "full amount of the victim's losses." As interpreted by the Fifth Circuit, Section 2259 perfectly follows the normal tort precept that intentional tortfeasors are jointly and severally liable for the entire harm they collectively cause.

The overriding goal for joint and several liability is compensating innocent victims, not spreading losses evenly across culpable defendants. In enacting Section 2259, Congress simply decided to place reimbursement ahead of other goals. Such an approach has the undeniable advantage that the risk of a wrongdoer's insolvency "is placed on each jointly and severally liable defendant—the [victim] does not bear this risk." *Restatement (Third): Apportionment*, *supra*, A18 cmt. a. This point is particularly important here because many child pornography criminals are indigent while innumerable others are beyond the reach of law enforcement. The only way for victims to actually obtain restitution for the "full amount" of

their losses is by collecting from a handful of solvent defendants. Amy, for instance, has received victim notices in more than 1800 cases since January 2006. She has received restitution awards in approximately 180 cases[17] and has now recovered slightly more than 40% of the full amount of her losses. Yet more than 75% of her collections have come from just a single defendant with substantial assets. *See United States v. Staples*, No. 2:09-CR-14017, doc. 32 (S.D. Fla. 2011). If Amy were remitted to piecemeal collection of tiny fractional shares of restitution, she would likely face decades of litigation that might never lead to full recovery.

Moreover, an unhappy wealthy criminal can always seek contribution from other solvent offenders, as even the dissenters below acknowledged. J.A. 492 & n.4. Attempting to deflect this sensible possibility, the other parties contend that contribution is unavailable to Section 2259 defendants. Pet. Br. 55-56; Gov't Br. 45-46. If their argument is correct, then Section 2259 simply tracks the traditional common law rule that contribution is unavailable between intentional tortfeasors. *Prosser & Keeton*, *supra*, at 336 (historically no contribution action was available

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[17] Much of the difference between the number of notices and number of awards is due to the fact that Amy lacked legal counsel in 2006. In 2008, Amy obtained counsel. In 2009, that counsel began litigating selective test cases, initially withdrawing 80% of her restitution claims. J.A. 158. Because the case law has developed in the years since, Amy's counsel now generally pursues all of her restitution claims to their conclusion.

to an intentional tortfeasor because the claim would rest "entirely [on] the plaintiff's own deliberate wrong").

But were a well-heeled child pornography offender to ever actually file a contribution lawsuit against another well-to-do offender,[18] his action should succeed under more modern principles. *See, e.g., United States v. Arledge*, 553 F.3d 881, 899 (5th Cir. 2008) (a defendant held jointly and severally liable for a restitution award "may seek contribution from his co-conspirators to pay off the restitution award"). This Court has recognized that even if Congress has not expressly created a contribution remedy, "if its intent to do so may fairly be inferred from . . . [other] statutes, an implied cause of action for contribution could be recognized. . . ." *Northwest Airlines, Inc. v. Transport Workers Union of Am., AFL-CIO*, 451 U.S. 77, 90 (1981); *see, e.g., Musick, Peeler & Garrett v. Employers Ins. of Wausau*, 508 U.S. 286, 297 (1993) (inferring a contribution action because no evidence suggested it would "frustrate the purposes of the statutory section from which it is derived"). Here, Congress requires that all defendants must pay the "full amount" of a victim's losses, 18 U.S.C. 2259(b)(1), which itself is a recognition that some defendants might have to pay more than others. Against this backdrop, it is fair to infer Congress's intent to create a system of joint and several liability

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[18] Of course, such a lawsuit would proceed through legal counsel. As registered sex offenders, child pornography defendants should not have personal contact with each other.

combined with contribution. As the Fifth Circuit panel opinion explained below: "Holding wrongdoers jointly and severally liable is no innovation. *See, e.g.*, 42 U.S.C. 9607(a) (CERCLA). It will, however, enable [petitioner] to distribute 'the full amount of the victim's losses' across other possessors of Amy's images. Among its virtues, joint and several liability shifts the chore of seeking contribution to the person who perpetrated the harm rather than its innocent recipient." J.A. 347. Congress properly created a regime in which innocent crime victims receive "full" restitution, leaving it to guilty defendants to sort out among themselves who will bear the financial burden.

V. EVEN IF SECTION 2259 CONTAINS A GENERAL PROXIMATE RESULT REQUIREMENT, ALL OF AMY'S INDIVISIBLE LOSSES PROXIMATELY RESULTED FROM PETITIONER'S CRIME

For all the reasons just explained, this Court should affirm the Fifth Circuit's interpretation of Section 2259. If this Court disagrees, however, and imposes a general proximate result requirement onto the statute, Amy will have some difficulties but can still obtain full restitution. Specifically, Amy should still receive restitution for all her indivisible losses that were the proximate result of petitioner's crime.

As the statute requires, Amy proved in the district court significant losses that she indisputably suffered, and will continue to suffer, as the proximate result of the child pornography crimes she endured.

On this point, all parties appear to agree. *See* Pet. Br. 49-50; Gov't Br. 47-49. Given this unchallenged evidence, any question of proximate cause essentially becomes irrelevant. "Proximate cause . . . exists on the aggregate level, and there is no reason to find it lacking on the individual level." *United States v. Kearney*, 672 F.3d 81, 98 (1st Cir. 2012). As the Government helpfully explains, "the link between the possession of child pornography and typical losses (e.g., therapy costs) incurred by [child pornography victims] is proximate by any definition." Gov't Br. 27.

Petitioner is one of the criminals from whose crime Amy's losses proximately resulted. The district court specifically found that "significant losses [by Amy] are attributed to . . . the possession of [Amy's] images by many individuals such as [petitioner]." J.A. 295. Where the district court went astray was in then failing to award any restitution on the ground that Amy had not shown what specific part of her losses proximately resulted from petitioner's crime. Amy did not need to make such a showing. She had carried her burden to show the "full amount" of her losses and was therefore entitled, under a mandatory statute, to a restitution award for that amount. 18 U.S.C. 2259(b)(1). If petitioner thought such restitution was too much, the burden shifted to him to show how to divide Amy's losses into some smaller, but nonetheless "full," amount.

Under conventional tort law, "a party alleging that damages are divisible has the burden to prove

they are divisible." *Restatement (Third): Apportionment*, *supra*, 26 cmt. h; *see, e.g.*, *Burlington Northern & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 614 (2009). Petitioner presented no evidence and made no argument below regarding how to divide Amy's "full" losses. Nor did the Government; to the contrary, the Government supported Amy's position that she was entitled to recover all of her losses from petitioner. *See, e.g.*, J.A. 149-50. Accordingly, in light of Congress's command that "[t]he issuance of a restitution order under [section 2259] is mandatory," 18 U.S.C. 2259(b)(4), the district court was required at sentencing to "direct the defendant to pay the victim . . . the full amount of the victim's losses. . . ." 18 U.S.C. 2259(b)(1).

Amy was entitled to recover all her losses from petitioner because her losses are indivisible. The other parties concede she can recover all "indivisible" losses. Pet. Br. 50; Gov't Br. 44 n.17. This is illustrated by the well-known two fires example—i.e., if two negligently set fires come together to burn down a house, the fire starters are both liable for the full value of the house because the loss cannot be reasonably divided. *See Prosser & Keeton*, *supra*, at 348.

Starting from this settled principle, the Seventh Circuit held that child pornography *distributors* are liable to pay restitution for all Amy's child pornography losses because it is impossible to determine what part of her losses each distributor caused. *United States v. Laraneta*, 700 F.3d 983, 991-92 (7th Cir. 2012). A distributor of a child pornography image

"may upload it to the Internet; dozens or hundreds of consumers of child pornography on the Internet may download the uploaded image and many of them may then upload it to their favorite child-pornography web sites; and the chain of downloading and uploading and thus distributing might continue indefinitely. That would be like the joint-fire case." *Id.* at 992. In various cases around the country, the Government has endorsed *Laraneta*'s well-founded holding that each convicted child pornography *distributor* proximately causes *all* of his victim's losses. *See, e.g.*, Gov't Post-Remand Br. Concerning Restitution, *United States v. Cantrelle*, No. 2:11-CR-542 (E.D. Cal. Apr. 3, 2013). Amy, of course, agrees.

But this holding raises the question of why the obligation to pay full restitution is limited to just child pornography distributors. Section 2259 draws no such distinction, since it applies expansively to "*any* offense under [chapter 110 of Title 18]." 18 U.S.C. 2259(a) (emphasis added). In *Laraneta*, the Seventh Circuit tried to distinguish between full restitution for distribution and fractional restitution for possession by arguing that Amy would have suffered slightly less harm if one less criminal had viewed (i.e., possessed) her images:

> If separate fires join and burn down the house, the harm is indivisible: the house is gone, and all the fire makers are liable even though any one of the fires would have destroyed the house. And in our [child pornography] distribution example, the distributors

> may be jointly liable though again the entire harm might have occurred had there been only a single distributor. But often psychological harm can be greater or less, and it would have been less in this case if instead of tens of thousands of images of Amy's . . . rapes being viewed on the Internet one image of each had been viewed by one person, the defendant.

Laraneta, 700 F.3d at 992. By focusing on the quantum of harm from each viewing of Amy's images, the Seventh Circuit missed a fundamental point: while Amy's psychological *harm* might in some theoretical sense be less if one fewer person had viewed her images, her *losses* would remain the same. Amy's full losses are documented to be $3,367,854. That amount will not change if 9,999 criminals view her images instead of 10,000—she still will have, for example, the same number of psychological counseling sessions during the course of her lifetime. Thus, even if her emotional harm is somehow divisible "to the eye of omniscience" (Gov't Br. 44 n.17), her financial *losses* are indivisible.

Moreover, this Court should interpret Section 2259 so that it will work not for those who are omniscient, but rather for real world fact-finders—i.e., district judges who must frequently enter child pornography restitution orders. "There is nothing in [Section 2259] that provides for a proportionality analysis." *United States v. Crandon*, 173 F.3d 122, 126 n.2 (3d Cir. 1999). On the contrary, rather than allowing a partial award, the statute mandates

restitution for the "full amount" of the victim's losses. This is consistent with the principle that courts are not required "to make an arbitrary apportionment for its own sake." *Burlington Northern*, 556 U.S. at 614. The normal tort inquiry is not whether damages are "theoretically" divisible (Gov't Br. 44 n.17), but instead whether "the evidence provides a reasonable basis for the fact-finder to determine . . . the amount of damages separately caused by [a tortfeasor's] conduct." *Restatement (Third): Apportionment*, *supra*, at 26. No evidence providing a "reasonable basis" for apportionment exists in cases such as this one. When, for example, Amy attends her next counseling session, there is no way to say what fraction of her bill is attributable to petitioner's crime as opposed to those committed by countless other criminals. *See United States v. Burgess*, 684 F.3d 445, 461 (4th Cir. 2012) (Gregory, J., concurring in part).

The indivisibility of Amy's losses becomes even more apparent when one realizes that the other parties cannot devise a reasonable basis for apportionment. The petitioner has never even pretended that apportionment is theoretically possible. The Government, on the other hand—while arguing to the district court that Amy should receive restitution for all her losses—now advances the new position that restitution should be limited to petitioner's "relative contribution" to Amy's full losses—i.e., petitioner's "market share." Gov't Br. 49 & n.20. Given the vast number of criminals who are injuring Amy, such an approach would relegate Amy (and the nation's

district courts) to decades of litigation about the size of the constantly-changing, global child pornography "market."

Such an approach would also mean trivial restitution for Amy. Amy's images have been identified in 3,200 American federal and state criminal cases. J.A. 352. Unfortunately these cases represent just a few of the child pornography criminals who are harming Amy, because law enforcement can only apprehend a small fraction of those who distribute and possess Amy's images. *See DOJ Report to Congress*, *supra*, at 23-25. Even ten percent is a generous assumption. *See id.* at 14 (9,793,430 domestic Internet Protocol addresses trading child pornography). Amy is harmed not only by child pornography crimes committed in this country, but also by those committed overseas. A fair estimate is that 45% of the child pornography criminals are American. *Id.* at 14 (table regarding domestic vs. international P2P file sharing of child pornography). Based on these figures, a ballpark estimate of petitioner's "market share" of Amy's harm is 1/71,000 and his restitution obligation to Amy would be a trifling amount: about $47.[19] The Government's suggestion that the district courts "should be given significant leeway" (Gov't Br. 49) to use such

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[19] $3,367,854 x 1/3,200 x 1/10 x 45/100 ≈ $47. Remarkably, this amount is several orders of magnitude below the presumed $150,000 in minimum damages that Congress specified for child pornography victims in civil cases for a violation of the same statute that petitioner violated here. 18 U.S.C. 2255.

methods to calculate restitution would convert Congress's promise to child pornography victims into an empty gesture. This Court should instead enforce the law as Congress wrote it: Amy should receive restitution for "the full amount" of her losses.

CONCLUSION

The decision of the Fifth Circuit should be affirmed in all respects.

Respectfully submitted,

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STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 2248 – Mandatory restitution

(a) In general.—Notwithstanding section 3663 or 3663A, and in addition to any other civil or criminal penalty authorized by law, the court shall order restitution for any offense under this chapter.

(b) Scope and nature of order.—

(1) Directions.—The order of restitution under this section shall direct the defendant to pay to the victim (through the appropriate court mechanism) the full amount of the victim's losses as determined by the court pursuant to paragraph (2).

(2) Enforcement.—An order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A.

(3) Definition.—For purposes of this subsection, the term "full amount of the victim's losses" includes any costs incurred by the victim for—

(A) medical services relating to physical, psychiatric, or psychological care;

(B) physical and occupational therapy or rehabilitation;

(C) necessary transportation, temporary housing, and child care expenses;

(D) lost income;

(E) attorneys' fees, plus any costs incurred in obtaining a civil protection order; and

(F) any other losses suffered by the victim as a proximate result of the offense.

(4) Order mandatory.—(A) The issuance of a restitution order under this section is mandatory.

(B) A court may not decline to issue an order under this section because of—

(i) the economic circumstances of the defendant; or

(ii) the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source.

(c) Definition.—For purposes of this section, the term "victim" means the individual harmed as a result of a commission of a crime under this chapter, including, in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, but in no event shall the defendant be named as such representative or guardian.

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18 U.S.C. § 2259 - Mandatory restitution

(a) In general.—Notwithstanding section 3663 or 3663A, and in addition to any other civil or criminal penalty authorized by law, the court shall order restitution for any offense under this chapter.

(b) Scope and nature of order.—

(1) Directions.—The order of restitution under this section shall direct the defendant to pay the victim (through the appropriate court mechanism) the full amount of the victim's losses as determined by the court pursuant to paragraph (2).

(2) Enforcement.—An order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A.

(3) Definition.—For purposes of this subsection, the term "full amount of the victim's losses" includes any costs incurred by the victim for—

(A) medical services relating to physical, psychiatric, or psychological care;

(B) physical and occupational therapy or rehabilitation;

(C) necessary transportation, temporary housing, and child care expenses;

(D) lost income;

(E) attorneys' fees, as well as other costs incurred; and

(F) any other losses suffered by the victim as a proximate result of the offense.

(4) Order mandatory.—(A) The issuance of a restitution order under this section is mandatory.

(B) A court may not decline to issue an order under this section because of—

(i) the economic circumstances of the defendant; or

(ii) the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source.

(c) Definition.—For purposes of this section, the term "victim" means the individual harmed as a result of a commission of a crime under this chapter, including, in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, but in no event shall the defendant be named as such representative or guardian.

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18 U.S.C. § 2264 – Restitution

(a) In general.—Notwithstanding section 3663 or 3663A, and in addition to any other civil or criminal penalty authorized by law, the court shall order restitution for any offense under this chapter.

(b) Scope and nature of order.—

(1) Directions.—The order of restitution under this section shall direct the defendant to pay the victim (through the appropriate court mechanism) the full amount of the victim's losses as determined by the court pursuant to paragraph (2).

(2) Enforcement.—An order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A.

(3) Definition.—For purposes of this subsection, the term "full amount of the victim's losses" includes any costs incurred by the victim for—

(A) medical services relating to physical, psychiatric, or psychological care;

(B) physical and occupational therapy or rehabilitation;

(C) necessary transportation, temporary housing, and child care expenses;

(D) lost income;

(E) attorneys' fees, plus any costs incurred in obtaining a civil protection order; and

(F) any other losses suffered by the victim as a proximate result of the offense.

(4) Order mandatory.—**(A)** The issuance of a restitution order under this section is mandatory.

(B) A court may not decline to issue an order under this section because of—

(i) the economic circumstances of the defendant; or

(ii) the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source.

(c) Victim defined.—For purposes of this section, the term "victim" means the individual harmed as a result of a commission of a crime under this chapter, including, in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, but in no event shall the defendant be named as such representative or guardian.

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18 U.S.C. 2327. Mandatory restitution

(a) In general.—Notwithstanding section 3663 or 3663A, and in addition to any other civil or criminal penalty authorized by law, the court shall order restitution to all victims of any offense for which an enhanced penalty is provided under section 2326.

(b) Scope and nature of order.—

(1) Directions.—The order of restitution under this section shall direct the defendant to pay to the victim (through the appropriate court mechanism) the full amount of the victim's losses as determined by the court pursuant to paragraph (2).

(2) Enforcement.—An order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A.

(3) Definition.—For purposes of this subsection, the term "full amount of the victim's losses" means all losses suffered by the victim as a proximate result of the offense.

(4) Order mandatory.—(A) The issuance of a restitution order under this section is mandatory.

(B) A court may not decline to issue an order under this section because of—

(i) the economic circumstances of the defendant; or

(ii) the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source.

(c) Victim defined.—In this section, the term "victim" has the meaning given that term in section 3663A(a)(2).

18 U.S.C. § 3663 – Order of restitution

(a)(1)(A) The court, when sentencing a defendant convicted of an offense under this title, section 401, 408(a), 409, 416, 420, or 422(a) of the Controlled Substances Act (21 U.S.C. 841, 848(a), 849, 856, 861, 863) (but in no case shall a participant in an offense under such sections be considered a victim of such offense under this section), or section 5124, 46312, 46502, or 46504 of title 49, other than an offense described in section 3663A(c), may order, in addition to or, in the case of a misdemeanor, in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense, or if the victim is deceased, to the victim's estate. The court may also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

(B)(i) The court, in determining whether to order restitution under this section, shall consider—

(I) the amount of the loss sustained by each victim as a result of the offense; and

(II) the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.

(ii) To the extent that the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution under this section outweighs the need to

provide restitution to any victims, the court may decline to make such an order.

(2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

(3) The court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement.

(b) The order may require that such defendant—

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense—

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impractical, or inadequate, pay an amount equal to the greater of—

(i) the value of the property on the date of the damage, loss, or destruction, or

(ii) the value of the property on the date of sentencing,

less the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim including an offense under chapter 109A or chapter 110—

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury also results in the death of a

victim, pay an amount equal to the cost of necessary funeral and related services;

(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses related to participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense;

(5) in any case, if the victim (or if the victim is deceased, the victim's estate) consents, make restitution in services in lieu of money, or make restitution to a person or organization designated by the victim or the estate; and

(6) in the case of an offense under sections 1028(a)(7) or 1028A(a) of this title, pay an amount equal to the value of the time reasonably spent by the victim in an attempt to remediate the intended or actual harm incurred by the victim from the offense.

(c)(1) Notwithstanding any other provision of law (but subject to the provisions of subsections (a)(1)(B)(i)(II) and (ii), when sentencing a defendant convicted of an offense described in section 401, 408(a), 409, 416, 420, or 422(a) of the Controlled Substances Act (21 U.S.C. 841, 848(a), 849, 856, 861, 863), in which there is no identifiable victim, the court may order that the defendant make restitution in accordance with this subsection.

(2)(A) An order of restitution under this subsection shall be based on the amount of public harm caused by the offense, as determined by the court in

accordance with guidelines promulgated by the United States Sentencing Commission.

(B) In no case shall the amount of restitution ordered under this subsection exceed the amount of the fine which may be ordered for the offense charged in the case.

(3) Restitution under this subsection shall be distributed as follows:

(A) 65 percent of the total amount of restitution shall be paid to the State entity designated to administer crime victim assistance in the State in which the crime occurred.

(B) 35 percent of the total amount of restitution shall be paid to the State entity designated to receive Federal substance abuse block grant funds.

(4) The court shall not make an award under this subsection if it appears likely that such award would interfere with a forfeiture under chapter 46 or chapter 96 of this title or under the Controlled Substances Act (21 U.S.C. 801 et seq.).

(5) Notwithstanding section 3612(c) or any other provision of law, a penalty assessment under section 3013 or a fine under subchapter C of chapter 227 shall take precedence over an order of restitution under this subsection.

(6) Requests for community restitution under this subsection may be considered in all plea agreements negotiated by the United States.

(7)(A) The United States Sentencing Commission shall promulgate guidelines to assist courts in determining the amount of restitution that may be ordered under this subsection.

(B) No restitution shall be ordered under this subsection until such time as the Sentencing Commission promulgates guidelines pursuant to this paragraph.

(d) An order of restitution made pursuant to this section shall be issued and enforced in accordance with section 3664.

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18 U.S.C. § 3663A – Mandatory restitution to victims of certain crimes

(a)(1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

(2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct

in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

(3) The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

(b) The order of restitution shall require that such defendant—

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense—

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to—

(i) the greater of—

(I) the value of the property on the date of the damage, loss, or destruction; or

(II) the value of the property on the date of sentencing, less

(ii) the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim—

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury that results in the death of the victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.

(c)(1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense—

(A) that is—

(i) a crime of violence, as defined in section 16;

(ii) an offense against property under this title, or under section 416(a) of the Controlled Substances Act (21 U.S.C. 856(a)), including any offense committed by fraud or deceit;

(iii) an offense described in section 1365 (relating to tampering with consumer products); or

(iv) an offense under section 670 (relating to theft of medical products); and

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

(2) In the case of a plea agreement that does not result in a conviction for an offense described in paragraph (1), this section shall apply only if the plea specifically states that an offense listed under such paragraph gave rise to the plea agreement.

(3) This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) if the court finds, from facts on the record, that—

(A) the number of identifiable victims is so large as to make restitution impracticable; or

(B) determining complex issues of fact related to the cause or amount of the victim's losses

would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

(d) An order of restitution under this section shall be issued and enforced in accordance with section 3664.

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18 U.S.C. § 3664 – Procedure for issuance and enforcement of order of restitution.

(a) For orders of restitution under this title, the court shall order the probation officer to obtain and include in its presentence report, or in a separate report, as the court may direct, information sufficient for the court to exercise its discretion in fashioning a restitution order. The report shall include, to the extent practicable, a complete accounting of the losses to each victim, any restitution owed pursuant to a plea agreement, and information relating to the economic circumstances of each defendant. If the number or identity of victims cannot be reasonably ascertained, or other circumstances exist that make this requirement clearly impracticable, the probation officer shall so inform the court.

(b) The court shall disclose to both the defendant and the attorney for the Government all portions of the presentence or other report pertaining to the matters described in subsection (a) of this section.

(c) The provisions of this chapter, chapter 227, and Rule 32(c) of the Federal Rules of Criminal Procedure shall be the only rules applicable to proceedings under this section.

(d)(1) Upon the request of the probation officer, but not later than 60 days prior to the date initially set for sentencing, the attorney for the Government, after consulting, to the extent practicable, with all identified victims, shall promptly provide the probation officer with a listing of the amounts subject to restitution.

(2) The probation officer shall, prior to submitting the presentence report under subsection (a), to the extent practicable—

(A) provide notice to all identified victims of—

(i) the offense or offenses of which the defendant was convicted;

(ii) the amounts subject to restitution submitted to the probation officer;

(iii) the opportunity of the victim to submit information to the probation officer concerning the amount of the victim's losses;

(iv) the scheduled date, time, and place of the sentencing hearing;

(v) the availability of a lien in favor of the victim pursuant to subsection (m)(1)(B); and

(vi) the opportunity of the victim to file with the probation officer a separate affidavit relating to the amount of the victim's losses subject to restitution; and

(B) provide the victim with an affidavit form to submit pursuant to subparagraph (A)(vi).

(3) Each defendant shall prepare and file with the probation officer an affidavit fully describing the financial resources of the defendant, including a complete listing of all assets owned or controlled by the defendant as of the date on which the defendant was arrested, the financial needs and earning ability of the defendant and the defendant's dependents, and such other information that the court requires relating to such other factors as the court deems appropriate.

(4) After reviewing the report of the probation officer, the court may require additional documentation or hear testimony. The privacy of any records filed, or testimony heard, pursuant to this section shall be maintained to the greatest extent possible, and such records may be filed or testimony heard in camera.

(5) If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further losses, the victim shall

have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.

(6) The court may refer any issue arising in connection with a proposed order of restitution to a magistrate judge or special master for proposed findings of fact and recommendations as to disposition, subject to a de novo determination of the issue by the court.

(e) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant's dependents, shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

(f)(1)(A) In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant.

(B) In no case shall the fact that a victim has received or is entitled to receive compensation with respect to a loss from insurance or any other source

be considered in determining the amount of restitution.

(2) Upon determination of the amount of restitution owed to each victim, the court shall, pursuant to section 3572, specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid, in consideration of—

(A) the financial resources and other assets of the defendant, including whether any of these assets are jointly controlled;

(B) projected earnings and other income of the defendant; and

(C) any financial obligations of the defendant; including obligations to dependents.

(3)(A) A restitution order may direct the defendant to make a single, lump-sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments.

(B) A restitution order may direct the defendant to make nominal periodic payments if the court finds from facts on the record that the economic circumstances of the defendant do not allow the payment of any amount of a restitution order, and do not allow for the payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments.

(4) An in-kind payment described in paragraph (3) may be in the form of—

(A) return of property;

(B) replacement of property; or

(C) if the victim agrees, services rendered to the victim or a person or organization other than the victim.

(g)(1) No victim shall be required to participate in any phase of a restitution order.

(2) A victim may at any time assign the victim's interest in restitution payments to the Crime Victims Fund in the Treasury without in any way impairing the obligation of the defendant to make such payments.

(h) If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant.

(i) If the court finds that more than 1 victim has sustained a loss requiring restitution by a defendant, the court may provide for a different payment schedule for each victim based on the type and amount of each victim's loss and accounting for the economic circumstances of each victim. In any case in which the United States is a victim, the court shall

ensure that all other victims receive full restitution before the United States receives any restitution.

(j)(1) If a victim has received compensation from insurance or any other source with respect to a loss, the court shall order that restitution be paid to the person who provided or is obligated to provide the compensation, but the restitution order shall provide that all restitution of victims required by the order be paid to the victims before any restitution is paid to such a provider of compensation.

(2) Any amount paid to a victim under an order of restitution shall be reduced by any amount later recovered as compensatory damages for the same loss by the victim in—

(A) any Federal civil proceeding; and

(B) any State civil proceeding, to the extent provided by the law of the State.

(k) A restitution order shall provide that the defendant shall notify the court and the Attorney General of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution. The court may also accept notification of a material change in the defendant's economic circumstances from the United States or from the victim. The Attorney General shall certify to the court that the victim or victims owed restitution by the defendant have been notified of the change in circumstances. Upon receipt of the notification, the court may, on its own motion, or the motion

of any party, including the victim, adjust the payment schedule, or require immediate payment in full, as the interests of justice require.

(l) A conviction of a defendant for an offense involving the act giving rise to an order of restitution shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim.

(m)(1)(A)(i) An order of restitution may be enforced by the United States in the manner provided for in subchapter C of chapter 227 and subchapter B of chapter 229 of this title; or

(ii) by all other available and reasonable means.

(B) At the request of a victim named in a restitution order, the clerk of the court shall issue an abstract of judgment certifying that a judgment has been entered in favor of such victim in the amount specified in the restitution order. Upon registering, recording, docketing, or indexing such abstract in accordance with the rules and requirements relating to judgments of the court of the State where the district court is located, the abstract of judgment shall be a lien on the property of the defendant located in such State in the same manner and to the same extent and under the same conditions as a judgment of a court of general jurisdiction in that State.

(2) An order of in-kind restitution in the form of services shall be enforced by the probation officer.

(n) If a person obligated to provide restitution, or pay a fine, receives substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still owed.

(o) A sentence that imposes an order of restitution is a final judgment notwithstanding the fact that—

(1) such a sentence can subsequently be—

(A) corrected under Rule 35 of the Federal Rules of Criminal Procedure and section 3742 of chapter 235 of this title;

(B) appealed and modified under section 3742;

(C) amended under subsection (d)(5); or

(D) adjusted under section 3664(k), 3572, or 3613A; or

(2) the defendant may be resentenced under section 3565 or 3614.

(p) Nothing in this section or sections 2248, 2259, 2264, 2327, 3663, and 3663A and arising out of the application of such sections, shall be construed to create a cause of action not otherwise authorized in favor of any person against the United States or any officer or employee of the United States.

18 U.S.C. § 3771 – Crime victims' rights

(a) Rights of crime victims.—A crime victim has the following rights:

(1) The right to be reasonably protected from the accused.

(2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.

(3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.

(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.

(5) The reasonable right to confer with the attorney for the Government in the case.

(6) The right to full and timely restitution as provided in law.

(7) The right to proceedings free from unreasonable delay.

(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

(b) Rights afforded.—

(1) In general.—In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a). Before making a determination described in subsection (a)(3), the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding. The reasons for any decision denying relief under this chapter shall be clearly stated on the record.

(2) Habeas corpus proceedings.—

(A) In general.—In a Federal habeas corpus proceeding arising out of a State conviction, the court shall ensure that a crime victim is afforded the rights described in paragraphs (3), (4), (7), and (8) of subsection (a).

(B) Enforcement.—

(i) In general.—These rights may be enforced by the crime victim or the crime victim's lawful representative in the manner described in paragraphs (1) and (3) of subsection (d).

(ii) Multiple victims.—In a case involving multiple victims, subsection (d)(2) shall also apply.

(C) Limitation.—This paragraph relates to the duties of a court in relation to the rights of a crime victim in Federal habeas

corpus proceedings arising out of a State conviction, and does not give rise to any obligation or requirement applicable to personnel of any agency of the Executive Branch of the Federal Government.

(D) Definition.—For purposes of this paragraph, the term "crime victim" means the person against whom the State offense is committed or, if that person is killed or incapacitated, that person's family member or other lawful representative.

(c) Best efforts to accord rights.—

(1) Government.—Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a).

(2) Advice of attorney.—The prosecutor shall advise the crime victim that the crime victim can seek the advice of an attorney with respect to the rights described in subsection (a).

(3) Notice.—Notice of release otherwise required pursuant to this chapter shall not be given if such notice may endanger the safety of any person.

(d) Enforcement and limitations.—

(1) Rights.—The crime victim or the crime victim's lawful representative, and the attorney for the Government may assert the rights described in

subsection (a). A person accused of the crime may not obtain any form of relief under this chapter.

(2) Multiple crime victims.—In a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings.

(3) Motion for relief and writ of mandamus.—The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall take up and decide any motion asserting a victim's right forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed. In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.

(4) Error.—In any appeal in a criminal case, the Government may assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates.

(5) Limitation on relief.—In no case shall a failure to afford a right under this chapter provide grounds for a new trial. A victim may make a motion to re-open a plea or sentence only if—

(A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied;

(B) the victim petitions the court of appeals for a writ of mandamus within 14 days; and

(C) in the case of a plea, the accused has not pled to the highest offense charged.

This paragraph does not affect the victim's right to restitution as provided in title 18, United States Code.

(6) No cause of action.—Nothing in this chapter shall be construed to authorize a cause of action for damages or to create, to enlarge, or to imply any duty or obligation to any victim or other person for the breach of which the United States or any of its officers or employees could be held liable in damages. Nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.

(e) Definitions.—For the purposes of this chapter, the term "crime victim" means a person

directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter, but in no event shall the defendant be named as such guardian or representative.

* * *

Early Version of Restitution Provisions

S. Rep. 101-545 (October 19, 1990)

SEC. 113. MANDATORY RESTITUTION FOR SEX CRIMES.

(a) In General.—Chapter 109A of title 18, United States Code, is amended by adding at the end thereof the following:

"§ 2248. Mandatory restitution

"(a) In General.—Notwithstanding the terms of section 3663 of this title, and in addition to any other civil or criminal penalty authorized by law, the court shall order restitution for any offense under this chapter.

"(b) Scope and Nature of Order.—(1) The order of restitution under this section shall direct that—

> "(A) the defendant pay to the victim the full amount of the victim's losses as determined by the court, pursuant to paragraph (3); and
>
> "(B) the United States Attorney enforce the restitution order by all available and reasonable means.

"(2) For purposes of this subsection, the term 'full amount of the victim's losses' includes any costs incurred by the victim for—

> "(A) medical services relating to physical, psychiatric, or psychological care;
>
> "(B) physical and occupational therapy or rehabilitation;

"(C) any income lost by the victim as a proximate result of the offense;

"(D) attorneys' fees; and

"(E) any other losses suffered by the victim as a proximate result of the offense.

"(3) Restitution orders under this section are mandatory. A court may not decline to issue an order under this section because of—

"(A) the economic circumstances of the defendant; or

"(B) the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source.

"(4)(A) Notwithstanding the terms of paragraph (3), the court may take into account the economic circumstances of the defendant in determining the manner in which and the schedule according to which the restitution is to be paid.

"(B) For purposes of this paragraph, the term 'economic circumstances' includes—

"(i) the financial resources and other assets of the defendant;

"(ii) projected earnings, earning capacity, and other income of the defendant; and

"(iii) any financial obligations of the defendant, including obligations to dependents.

"(C) An order under this section may direct the defendant to make a single lump-sum payment or partial payments at specified intervals. The order shall also provide that the defendant's restitutionary obligation takes priority over any criminal fine ordered.

"(D) In the event that the victim has recovered for any amount of loss through the proceeds of insurance or any other source, the order of restitution shall provide that restitution be paid to the person who provided the compensation, but that restitution shall be paid to the victim before any restitution is paid to any other provider of compensation.

"(5) Any amount paid to a victim under this section shall be set off against any amount later recovered as compensatory damages by the victim from the defendant in—

"(A) any Federal civil proceeding; and

"(B) any State civil proceeding, to the extent provided by the law of the State.

"(c) Proof of Claim.—(1) Within 60 days after conviction and, in any event, no later than 10 days prior to sentencing, the United States Attorney (or his delegee), after consulting with the victim, shall prepare and file an affidavit with the court listing the amounts subject to restitution under this section. The affidavit shall be signed by the United States Attorney (or his delegee) and the victim. Should the victim object to any of the information included in the

affidavit, the United States Attorney (or his delegee) shall advise the victim that the victim may file a separate affidavit.

"(2) If no objection is raised by the defendant, the amounts attested to in the affidavit filed pursuant to subsection (1) shall be entered in the court's restitution order. If objection is raised, the court may require the victim or the United States Attorney (or his delegee) to submit further affidavits or other supporting documents, demonstrating the victim's losses.

"(3) If the court concludes, after reviewing the supporting documentation and considering the defendant's objections, that there is a substantial reason for doubting the authenticity or veracity of the records submitted, the court may require additional documentation or hear testimony on those questions. Any records filed, or testimony heard, pursuant to this section, shall be in camera in the judge's chambers. Notwithstanding any other provision of law, this section does not entitle the defendant to discovery of the contents of, or related to, any supporting documentation, including medical, psychological, or psychiatric records.

"(d) Definitions.—For purposes of this section, the term 'victim' includes any person who has suffered direct physical, emotional, or pecuniary harm as a result of a commission of a crime under this chapter, including—

"(1) in the case of a victim who is under 18 years of age, incompetent or incapacitated,

the legal guardian of the victim or the victim's estate, another family member, or any other person designated by the court; and

"(2) in the case of a victim who is deceased, the representative of the victim's estate or another family member (including a child).".

"§ 2264. Restitution

"(a) In General.—In addition to any fine or term of imprisonment provided under this chapter, and notwithstanding the terms of section 3663 of this title, the court shall order restitution to the victim of an offense under this chapter.

"(b) Scope and Nature of Order.—(1) The order of restitution under this section shall direct that—

"(A) the defendant pay to the victim the full amount of the victim's losses as determined by the court, pursuant to subsection (3); and

"(B) the United States Attorney enforce the restitution order by all available and reasonable means.

"(2) For purposes of this subsection, the term 'full amount of the victim's losses' includes any costs incurred by the victim for—

"(A) medical services relating to physical, psychiatric, or psychological care;

"(B) physical and occupational therapy or rehabilitation;

"(C) any income lost by the victim as a proximate result of the offense;

"(D) attorneys' fees, plus any costs incurred in obtaining a civil protection order; and

"(E) any other losses suffered by the victim as a proximate result of the offense.

"(3) Restitution orders under this section are mandatory. A court may not decline to issue an order under this section because of—

"(A) the economic circumstances of the defendant; or

"(B) the fact that victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance.

"(4)(A) Notwithstanding the terms of paragraph (3), the court may take into account the economic circumstances of the defendant in determining the manner in which and the schedule according to which the restitution is to be paid, including—

"(i) the financial resources and other assets of the defendant;

"(ii) projected earnings, earning capacity, and other income of the defendant; and

"(iii) any financial obligations of the offender, including obligations to dependents.

"(B) An order under this section may direct the defendant to make a single lump-sum payment, or partial payments at specified intervals. The order shall provide that the defendant's restitutionary obligation takes priority over any criminal fine ordered.

"(C) In the event that the victim has recovered for any amount of loss through the proceeds of insurance or any other source, the order of restitution shall provide that restitution be paid to the person who provided the compensation, but that restitution shall be paid to the victim before any restitution is paid to any other provider of compensation.

"(5) Any amount paid to a victim under this section shall be set off against any amount later recovered as compensatory damages by the victim from the defendant in—

"(A) any Federal civil proceeding; and

"(B) any State civil proceeding, to the extent provided by the law of the State.

"(c) Proof of Claim.—(1) Within 60 days after conviction and, in any event, no later than 10 days prior to sentencing, the United States Attorney (or his delegee), after consulting with the victim, shall prepare and file an affidavit with the court listing the amounts subject to restitution under this section. The affidavit shall be signed by the United States Attorney (or his delegee) and the victim. Should the victim object to any of the information included in the affidavit, the United States Attorney (or his delegee)

shall advise the victim that the victim may file a separate affidavit.

"(2) If no objection is raised by the defendant, the amounts attested to in the affidavit filed pursuant to subsection (1) shall be entered in the court's restitution order. If objection is raised, the court may require the victim or the United States Attorney (or his delegee) to submit further affidavits or other supporting documents, demonstrating the victim's losses.

"(3) If the court concludes, after reviewing the supporting documentation and considering the defendant's objections, that there is a substantial reason for doubting the authenticity or veracity of the records submitted, the court may require additional documentation or hear testimony on those questions. Any records filed, or testimony heard, pursuant to this section, shall be in camera in the judge's chambers. Notwithstanding any other provision of law, this section does not entitle the defendant to discovery of the contents of, or related to, any supporting documentation, including medical, psychological, or psychiatric records.

"(d) Restitution and Criminal Penalties.—An award of restitution to the victim of an offense under this chapter shall not be a substitute for imposition of punishment under sections 2261 and 2262.

"(e) Definitions.—For purposes of this section, the term 'victim' includes any person who has suffered direct physical, emotional, or pecuniary harm as

a result of a commission of a crime under this chapter, including—

> "(1) in the case of a victim who is under 18 years of age, incompetent or incapacitated, the legal guardian of the victim or the victim's estate, another family member, or any other person designated by the court; and
>
> "(2) in the case of a victim who is deceased, the representative of the victim's estate or family member, including a child.

Indentation of Section 2259 As Presented to Congress

Violent Crime Control and Law Enforcement Act of 1994, H.R. 3355, 103d Cong. 2d Sess. (1994)

Sec. 40113. Mandatory Restitution for Sex Crimes.

§ 2259(b)

. . .

"(3) DEFINITION.--For purposes of this subsection, the term 'full amount of the victim's losses' includes any costs incurred by the victim for--

"(A) medical services relating to physical, psychiatric, or psychological care;

"(B) physical and occupational therapy or rehabilitation;

"(C) necessary transportation, temporary housing, and child care expenses;

"(D) lost income;

"(E) attorneys' fees, as well as other costs incurred; and

"(F) any other losses suffered by the victim as a proximate result of the offense.

RESPONDENT'S BRIEF

Supreme Court, U.S.
FILED
AUG 19 2013
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No. 12-8561

In The Supreme Court of the United States

DOYLE RANDALL PAROLINE,

Petitioner,

v.

UNITED STATES ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENT MICHAEL WRIGHT IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

What, if any, causal relationship or nexus between the defendant's conduct and the victim's harm or damages must the government or the victim establish in order to recover restitution under 18 U.S.C. § 2259?

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STATEMENT OF THE CASE

The *en banc* Fifth Circuit decision under review resolved two cases. J.A. 425-26, 428. One was respondent Amy Unknown's petition for a writ of mandamus to review a decision of the District Court for the Eastern District of Texas denying her request for restitution from petitioner Doyle Randall Paroline. J.A. 429-30. The other was respondent Michael Wright's appeal from a judgment of the District Court of the Eastern District of Louisiana ordering Wright to pay $529,661 in restitution to Amy. Both defendants had pleaded guilty to a single count of possession of child pornography, in violation of 18 U.S.C. § 2252(a)(4)(B). J.A. 430-33. The *en banc* Fifth Circuit granted Amy's mandamus petition in Paroline's case and remanded for entry of an order to pay the full amount of restitution that Amy requested: $3.4 million. J.A. 478-79. Initially, the Fifth Circuit also vacated the judgment in Wright's case and remanded because the restitution award was less than $3.4 million. J.A. 403-04; *see* J.A. 426-27 n.1. On reconsideration, however, it affirmed the $529,661 award because the Government had not appealed. J.A. 426 n.1, 479-80.

This Court granted Paroline's petition for certiorari but did not rule on Wright's. *See* Dkt. No. 12-8505. Wright, however, was a party to the *en banc* proceeding in the Fifth Circuit, which gave rise to the

judgment now under review.[1] As a respondent under Supreme Court Rule 12.6, Wright files this brief in support of petitioner Paroline.

SUMMARY OF ARGUMENT

Restitution under 18 U.S.C. § 2259 is limited to those harms which are factually and proximately caused by the offense conduct of the particular defendant before the court. The proximate-cause requirement is contained in the definition of "the full amount of the victim's losses" at § 2259(b)(3). The definition is comprised of a six-part list. The list consists of five specific types of losses, which are examples of the sixth item, "any other losses suffered by the victim as a proximate result of the offense." The word "other" is key because it indicates that the enumerated losses are part of the general set of losses described in the sixth subparagraph, that is, they are instances of "losses suffered by the victim as a proximate result of the offense." This is the teaching of the

[1] Letter from Geralyn A. Maher, Calendar Clerk, U.S. Court of Appeals for the Fifth Circuit, to Paul G. Cassell, Robin E. Schulberg, and Michael A. Rotker, Esqs. (Feb. 6, 2012) ("[T]he court has directed that 45 minutes 'per side' of argument time will be allotted, rather than scheduling two separate, full arguments."), available at https://ecf.ca5.uscourts.gov/docs1/00501749252 (PACER login required); Windows Media File: *En Banc* Oral Argument Recording, *In re Amy Unknown*, Nos. 09-41238, 09-41254, & 09-31215 (5th Cir. May 3, 2012), http://www.ca5.uscourts.gov/OralArgRecordings/09/09-41238_5-3-2012.wma.

Court's interpretation of the word "otherwise" in the residual clause of the definition of "violent felony" in the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), in *Begay v. United States*, 553 U.S. 137 (2008).

It should go without saying that compensable harms are limited to those caused by the offense conduct of the particular defendant before the Court. This limitation is contained in the definition of compensable losses at § 2259(b)(3), but it also is the holding of *Hughey v. United States*, 495 U.S. 411 (1990). Although an interpretation of the Victim and Witness Protection Act (VWPA), *Hughey* has become a key principle of restitution law. It applies to § 2259 because § 2259, like the VWPA, is offense-centric.

The Fifth Circuit, however, relies on the phrase "the full amount of the victim's losses" to reject both a proximate-cause requirement and the *Hughey* principle. The Fifth Circuit's interpretation of that phrase is incorrect. Several years before the enactment of § 2259, "the full amount of the victim's losses" was incorporated in three bills aimed at enacting what ultimately became the Mandatory Victims Restitution Act (MVRA). As originally proposed, the phrase would have replaced the section in the VWPA that gave courts the option of reducing a restitution award to take account of a defendant's indigence. "The full amount of the victim's losses" rejected this manner of calculating restitution awards. The MVRA put that same language into 18 U.S.C. § 3664, which provides the mechanism for issuing and enforcing restitution

orders under §§ 2259, 3663 and 3663A. Given the connection between §§ 2259 and 3664, it is unlikely that Congress intended the same phrase to mean different things in the two statutes.

Amy is seeking restitution for losses flowing from the emotional distress she suffered as a result of the distribution of her images on the internet. She stipulated, however, that she never knew of Paroline's offense conduct. Therefore, Paroline's possession of the images could not, as a factual matter, have caused her emotional distress. The district court's order denying restitution should be reinstated.

ARGUMENT

I. Restitution under § 2259 is limited by the language of § 2259(b)(3) to losses proximately resulting from the defendant's offense conduct.

The plain language of § 2259 allows restitution only for losses proximately caused by the defendant's offense conduct. This is because the enumerated losses listed at § 2259(b)(3)(A)-(E) fall within the set of losses defined by the catch-all category, § 2259(b)(3)(F), and hence are subject to its proximate-cause limitation.

The catch-all category of losses at 18 U.S.C. § 2259(b)(3)(F) resembles the residual clause in the Armed Career Criminal Act's definition of "violent felony," 18 U.S.C. § 924(e)(2)(B)(ii), which this Court

has interpreted numerous times. The ACCA residual clause states:

> or *otherwise* involves conduct that presents a serious potential risk of physical injury to another.[2]

(Emphasis added). The catch-all category of losses at § 2259(b)(3)(F) consists of:

> any *other* losses suffered by the victim as a proximate result of the offense.[3]

---

[2] 18 U.S.C. § 924(e)(2)(B) provides in pertinent part:

[T]he term "violent felony" means any crime . . . that

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious risk of physical injury to another.

[3] 18 U.S.C. § 2259(b)(3) provides:

Definition.—For purposes of this subsection, the term "full amount of the victim's losses" includes any costs incurred by the victim for—

(A) medical services relating to physical, psychiatric, or psychological care;

(B) physical and occupational therapy or rehabilitation;

(C) necessary transportation, temporary housing, and child care expenses;

(D) lost income;

(E) attorney's fees, as well as other costs incurred; and

(Continued on following page)

(Emphasis added). "Otherwise" connects the enumerated categories of violent felonies with the ACCA residual clause, while "other" connects the enumerated types of losses with the catch-all phrase in the § 2259 definition of loss. This Court's decision in *Begay v. United States*, 553 U.S. 137 (2008), provides guidance in how to interpret "other."

In *Begay*, this Court recognized that "otherwise" denoted a similarity between the general category described in the residual clause and the specific examples that preceded it. *Id.* at 150-51 (Scalia, J., concurring). Although there was disagreement on the Court about what that similarity was, there was agreement that it meant *at least* the similarity identified by Justice Scalia in his concurrence: "the particular similarity specified after the 'otherwise' – *i.e.*, that they all pose a serious potential risk of physical injury to another." *Id.* at 150-51 (Scalia, J., concurring) (emphasis omitted); *see id.* at 144 (majority).

> [B]y using the word "otherwise" the writer draws a substantive connection between two sets . . . on one specific dimension – *i.e.*, whatever follows "otherwise." What that means here is that committing one of the enumerated crimes is *one way* to commit a crime "involving a serious potential risk of physical injury to another"; and that *other*

(F) any other losses suffered by the victim as a proximate result of the offense.

> *ways* of committing a crime of that character similarly constitute "violent felonies."

Id. at 151 (Scalia, J., concurring) (emphasis in original) (internal quotation marks and citations omitted).

Similarly in the instant context, by using the word "other," Congress drew a substantive connection between the specific category of losses listed at § 2259(b)(3)(A)-(E) – medical services, physical and occupational therapy or rehabilitation, etc. – and the residual category, described as "other losses suffered by the victim as a proximate result of the offense." What that means is that any one of the enumerated losses is a type of loss "suffered by the victim as a proximate result of the offense." Therefore, the enumerated losses listed in subparagraphs § 2259(b)(3)(A) through (E) must be losses that proximately result from the offense. Congress did not make the proximate-cause requirement explicit in each of the enumerated types of losses because it viewed them as examples of the general category of losses described in § 2259(b)(3)(F).

Admittedly there are distinctions between the instant case and *Begay*. These distinctions, however, show why the disagreement between the majority and Justice Scalia in *Begay* does not arise in the instant case. *Begay* involved the interpretation of the ACCA residual clause. The disagreement was about whether the specific examples limited the residual clause in a manner beyond the common denominator ("conduct that presents a serious potential risk of physical injury to another"). By contrast the instant

case involves the interpretation of the specifically enumerated items. The only issue is whether they must share the characteristics that define the residual category ("losses suffered by the victim as a proximate result of the offense"). The reasoning applied in *Begay* says they must.

II. The only compensable losses under § 2259 are those resulting from the offense conduct of the particular defendant to whom the restitution order applies.

In *Hughey v. United States*, 495 U.S. 411, 413 (1990), this Court interpreted the Victim and Witness Protection Act (VWPA), then 18 U.S.C. §§ 3579-80, now § 3663, "to authorize an award of restitution only for the loss caused by the specific conduct that is the basis of the offense of conviction." Although the defendant pleaded guilty to only one of the charges brought against him, the district court entered a restitution award which included compensation for the other offenses. This Court reversed the award. It relied on the scope of the authorization (to order restitution "to any victim of such offense"), and on the statutory description of possible losses ("in the case of an offense resulting in . . . ."). *Hughey*, 495 U.S. at 416. "Given that the ordinary meaning of 'restitution' is restoring someone to a position he occupied before a particular event, the repeated focus in § 3579 on the offense of which the defendant was convicted suggests strongly that restitution as authorized by the statute is intended to compensate victims only for losses

caused by the conduct underlying the offense of conviction." *Id.*[4]

Although *Hughey* was a case of statutory interpretation, it has come to stand for "a key principle of restitution law." Catherine M. Goodwin, FEDERAL CRIMINAL RESTITUTION § 7.27, at 322 (2012 ed.). The circuits have broadly applied it to § 3663A. *See, e.g.*, *United States v. Oladimeji*, 463 F.3d 152, 157-58 & n.1 (2d Cir. 2006); *Singh v. Attorney General of U.S.*, 677 F.3d 503, 513 (3d Cir. 2012); *United States v. Squirrel*, 588 F.3d 207, 215 (4th Cir. 2009); *United States v. Mancillas*, 172 F.3d 341, 343 (5th Cir. 1999); *United States v. Jones*, 641 F.3d 706, 714 (6th Cir. 2011); *United States v. Randle*, 324 F.3d 550, 555-56 & n.3 (7th Cir. 2003); *United States v. DeRosier*, 501 F.3d 888, 896 & n.13 (8th Cir. 2007); *United States v.*

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[4] In reaction to *Hughey*, Congress modified the definition of "victim" in § 3663 in 1990 to include "a victim of an offense that involves as an element a scheme, a conspiracy, or a pattern of criminal activity means any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern." Crime Control Act of 1990, Pub. L. No. 101-647, § 2509, 104 Stat. 4789, 4863. Similar language was incorporated in the Mandatory Victims' Restitution Act of 1996, Pub. L. No. 104-132, §§ 204(a), 205(a)(1)(E), 110 Stat. 1227, 1228, 1230. This addition does not undermine the *Hughey* principle that restitution is limited to losses caused by the defendant's offense conduct because the "scheme, conspiracy, or pattern of criminal activity" must be "an element" of the offense of conviction, and the defendant's conduct must be the cause of the harm. In any event, the offense at issue in the instant case, 18 U.S.C. § 2252(a)(4)(B), does not involve a scheme, conspiracy, or pattern of criminal activity as an element of the offense.

Griffith, 584 F.3d 1004, 1019 (10th Cir. 2009). The plain language of § 2259 calls for application of *Hughey* to that statute as well.

Section 2259(a) directs a court to order restitution "for any *offense* under this subchapter." (Emphasis added). This section imposes both a duty – to order restitution for an offense – and a limitation on authority. Since a court has no power to order restitution beyond the scope of statutory authorization, *see, e.g.*, *United States v. Zangari*, 677 F.3d 86, 91 (2d Cir. 2012); *United States v. Love*, 431 F.3d 477, 479 (5th Cir. 2005), subsection (a) limits a court's authority to order restitution under § 2259 to compensation for losses resulting from the offense of conviction. Likewise, § 2259(b)(3) defines compensable losses as those suffered "as a proximate result of the offense," and § 2259(c) defines "victim" as "the individual harmed as a result of a commission of a crime." The repeated references to the "offense" call for the same limitation as the *Hughey* Court found in the VWPA: § 2259 restitution is limited to compensation for losses caused by the specific conduct underlying the offense of conviction.

The instant dispute has a different focus from *Hughey*: the Fifth Circuit requires defendants to pay for losses caused by the conduct of other people, while the district court in *Hughey* ordered restitution for conduct of which the defendant was not convicted. Still, the principle is the same. If a defendant cannot be ordered to pay restitution for conduct of which he

was not convicted, then he certainly cannot be ordered to pay restitution for other people's conduct.

The Fifth Circuit's interpretation of § 2259 is directly contrary to this principle. It requires a defendant to compensate a victim for losses caused by others. The $3.4 million that Amy sought represented losses caused by the original sexual abuse and the dissemination of the resultant images on the internet.[5] A defendant who merely views Amy's image on the internet causes at most a *de minimis* portion of these losses. Nevertheless, the Fifth Circuit requires that he be ordered to pay for all of them.

Of note, the Government made two unsuccessful arguments in *Hughey* similar to those which arose below in the instant case. One was that the offense-of-conviction limitation concerned who was eligible for restitution, not how much restitution was due. *Id.* at 416. That in fact is the Fifth Circuit's *de facto* position: once a defendant's offense satisfies the statutory definition of "victim," then he is liable for the losses caused by everyone who has "victimized" the same person. J.A. 451. This Court rejected that position in *Hughey*, as it should here. 495 U.S. at 417-20. The other argument is that the VWPA should be interpreted expansively to serve the statutory purpose

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[5] *See* J.A. 81, Report of Psychological Consultation by Joyanna Silberg, Ph.D. (Nov. 21, 2008) ("The sexual assault perpetrated against Amy, and its continued memorialization in pictures which continue to be traded and used[,] affect her in a variety of ways . . ").

of compensating victims. *Id.* at 420. Similarly here, Amy has used Congress's intent to help the victims of child pornography to oppose limiting § 2259 restitution to losses caused by the specific defendant. Although this Court in *Hughey* recognized that "[t]hese concerns are not insignificant ones," *id.* at 421, this Court nevertheless interpreted the statute as written, *id.* at 421-22. This Court should do the same here.

In support of its holding in *Hughey*, this Court quoted a House report accompanying an amended version of the VWPA which stated, "To order a defendant to make restitution to a victim of an offense for which the defendant was not convicted would be to deprive the defendant of property without due process of law." 495 U.S. at 421 n.5 (quoting H.R. Rep. No. 98-1017, at 83 n.43 (1983)). So too here, ordering a defendant to make restitution for losses resulting from offenses that he did not commit likewise offends due process. This Court should reject the Fifth Circuit's position to avoid the serious constitutional problems that otherwise would arise.

III. Contrary to the Fifth Circuit's interpretation, "the full amount of the victim's losses" means losses proximately caused by the offense conduct of the particular defendant.

The Fifth Circuit's opinion relies heavily on the directive in § 2259(b)(1) that "[t]he order of restitution under this section shall direct the defendant to

pay . . . the full amount of the victim's losses." The Fifth Circuit reasoned that this language required restitution in the amount of the full $3.4 million that Amy requested upon proof that a defendant's offense conduct harmed Amy, regardless of the extent of the harm. J.A. 428, 465-72, 477. In other words, "in for a penny, in for a pound." The Fifth Circuit's conclusion rests on an incorrect interpretation of "the full amount of the victim's losses."

"The full amount of the victim's losses" does not mean whatever losses the victim incurred, regardless of who caused them. "Losses" are defined in § 2259(b)(3)(F) in terms of the losses "suffered by the victim as a proximate result of the offense," including (as argued above) the specific types of losses listed at § 2259(b)(3)(A)-(E). Even accepting *arguendo* the Fifth Circuit's position that the enumerated losses do not have a proximate-cause requirement, the definition of "victim" at § 2259(c) limits compensable losses to those caused by harms suffered "as a result of the commission of a crime." The Fifth Circuit's award of $3.4 million to cover all Amy's losses from her sexual abuse and its distribution on the internet consists almost entirely (and in Paroline's case, entirely, J.A. 230) of losses caused by persons other than the individual defendant convicted of possessing her image. *See United States v. Laraneta*, 700 F.3d 983, 991 (7th Cir. 2012) (Posner, J.) ("[I]t is beyond implausible that the victims would have suffered the harm they did had [the defendant] been the only person in the world to view pornographic images of them.").

The phrase "full amount of the losses" is not unique to § 2259. It is also found in 18 U.S.C. § 3664, which governs the issuance and enforcement of restitution orders, including those under 18 U.S.C. §§ 2259, 3663 and 3663A. Section 3664(f)(1)(A) states:

> In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant.

The circuits overwhelmingly recognize that restitution under § 3663A is limited to losses caused by the defendant's offense conduct.[6] Indeed, 18 U.S.C. § 3663A(a)(2) defines "victim" as "a person directly and proximately harmed as a result of the commission of an offense." In light of the limits on restitution under § 3663A, the directive that the court order restitution in the "full amount of each victim's losses" in § 3664(f)(1)(A) could not require restitution for

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[6] *United States v. Janosko*, 642 F.3d 40, 41-42 (1st Cir. 2011) (applying *Hughey*, 495 U.S. at 412-22, to the MVRA, § 3663A); *United States v. Oladimeji*, 463 F.3d 152, 157-58 & n.1 (2d Cir. 2006) (same); *Singh v. Attorney General of U.S.*, 677 F.3d 503, 513 & n.12 (3d Cir. 2012) (same); *United States v. Newsome*, 322 F.3d 328, 340-41 (4th Cir. 2003) (same); *United States v. Maturin*, 488 F.3d 657, 660-61 & n.2 (5th Cir. 2007) (same); *United States v. Jones*, 641 F.3d 706, 714 (6th Cir. 2011) (same); *United States v. Randle*, 324 F.3d 550, 555-56 & n.3 (7th Cir. 2003) (same); *United States v. DeRosier*, 501 F.3d 888, 896 & n.13 (8th Cir. 2007) (same); *United States v. Griffith*, 584 F.3d 1004, 1019 (10th Cir. 2009) (same); *United States v. Fair*, 699 F.3d 508, 512 (D.C. Cir. 2012) (same).

losses beyond those caused by the offense conduct of the defendant in the criminal proceeding in which the restitution is being ordered.

Congress surely intended the phrase "full amount of the victim's losses" to mean the same thing in § 2259(b)(3) and § 3664(f)(1)(A). As originally enacted in 1994, § 2259(b)(1) directed courts to order restitution "in the full amount of the victim's losses." Pub. L. No. 103-322, § 40113(b), 108 Stat. 1902, 1907. It was not the first time, however, Congress had used that phrase. The language of what is now § 3664(f)(1)(A) was proposed as § 4(d)(1)(A) of the Victims' Rights and Restitution Act of 1990, H.R. 5368, 101st Cong. (1990),[7] and again as § 2(d)(1)(A) of the Crime Victims' Restitution Act of 1991, H.R. 1809, 102d Cong. (1991),[8] and S. 566, 102d Cong. (1991).[9] The bills provided:

> The court shall order restitution to a victim in the full amount of the victim's losses as determined by the court and without consideration of –
>
> (A) the economic circumstances of the offender . . . .

None of these bills became law, but they establish two things. First, the phrase "in the full amount of the victim's losses" was familiar to Congress at least four

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[7] *Available at* http://tinyurl.com/hr5368101.

[8] *Available at* http://tinyurl.com/hr1809102.

[9] *Available at* http://tinyurl.com/s566102C.

years before Congress included it in § 2259. Second, the phrase reflected congressional dissatisfaction with the VWPA, § 3663, which allowed a court to award less than the full amount of the victim's losses or no restitution at all if it thought the defendant could not pay. The directive to order restitution in "the full amount of the victim's losses" was intended to reject the more limited scope of restitution in the VWPA. Indeed, these same bills proposed to substitute "the court shall order" for "the court may order" in § 3663(a)(1)(A). *See also* S. Rep. No. 103-138, at 56 (1993) (explaining that § 2248 and § 2259 were intended to "reverse" the "assumption" under § 3663 that restitution should not be ordered because the defendant lacked the resources to pay); Goodwin, *supra*, § 2.18, at 37 (stating that "full amount" means that the amount of restitution "cannot be based on a consideration of the defendant's financial circumstances"). The phrase had nothing to do with whether the victim's compensable losses were limited by the rule of *Hughey* or by principles of proximate causation.

The push for mandatory restitution (other than in sex abuse cases such as § 2259) culminated in the enactment of the Mandatory Victims' Restitution Act (MVRA), Pub. L. No. 104-132, 110 Stat. 1227, 1227-41, in 1996. The MVRA did three things of relevance here. First, it enacted § 3663A, the mandatory restitution statute. *See id.* at § 204, 110 Stat. at 1227-29. Second, it added the "full amount of the losses" language at § 3664(f)(1)(A) as part of a larger revision of

that statute. *See id.* at § 206, 110 Stat. at 1234. Third, it added a requirement at § 2259(b)(2) that restitution orders under § 2259 "shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A." *See id.* at § 205(a)(1)(E), 110 Stat. at 1231. With the 1996 amendment, § 2259(b) now states that "(1) [t]he order of restitution . . . shall direct the defendant to pay the victim . . . the full amount of the victim's losses . . . (2) in accordance with section 3664 . . . ." In this context, it is unlikely that Congress intended "the full amount of the victim's losses" to mean different things in § 2259 and § 3664.

In sum, "the full amount of the victim's losses" for purposes of § 2259 means the same thing as "the full amount of the victim's losses" in § 3664(f)(1)(A), which does not extend compensable losses beyond those allowed under § 3663A, that is, losses proximately caused by the defendant's offense conduct.

IV. Paroline did not cause the emotional distress which led to Amy's need for mental health counseling and reduced her earning potential because Amy stipulated that she never knew of his offense conduct.

Limiting § 2259 restitution to losses proximately caused by the particular defendant's offense conduct makes resolution of this case straight-forward. The main losses that Amy claims – the cost of mental health counseling and reduced earning potential –

flow from her emotional distress. But as a factual matter Paroline did not cause Amy emotional distress because she stipulated in the district court that she did not know of his offense conduct. J.A. 230. Therefore, he did not cause the losses that Amy claims as a result of her emotional distress.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Fifth Circuit with instructions to affirm the district court's judgment in Paroline's case.

Respectfully submitted,

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Supreme Court of the United States

DOYLE RANDALL PAROLINE,
Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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I. MR. PAROLINE'S OFFENSE WAS NOT A CAUSE-IN-FACT OF AMY'S HARM.

All parties agree that some showing of factual harm is necessary before courts can order restitution from defendants. Amy contends, in wholly conclusory fashion, that Mr. Paroline's actions were a cause-in-fact of her injuries because she was harmed by the "vast criminal machinery" behind the distribution of her images and that Mr. Paroline's actions played a role in that machinery. Resp't Br.[1] 9-11. Mr. Paroline, however, did not put a "vast criminal machinery" in motion as would be required for a showing of "but-for" causation, or "cause-in-fact," nor is it reasonable to assume that his actions had any effect on such machinery, whether to start, stop, or expand it in any meaningful way. *United States* v. *Laraneta*, 700 F.3d 983, 991 (7th Cir. 2012), *cert. denied*, 134 S. Ct. 235 (2013).

The Solicitor General agrees that Amy has met her burden of showing factual causation, but is only able to do so by suggesting that the Court adopt a civil tort doctrine—the aggregate causation rule—that originated with Professors Prosser and Keeton. S.G. Br. 19-22 (citing W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 41, at 268-69 (5th ed. 1984)). But the Solicitor General fails to explain that Profs. Prosser and Keeton would apply the rule only if "each of the defendants bears a *like relationship*" to the harm *and* if "[e]ach seeks to escape liability for a reason that, if recognized, would likewise protect each other defendant in the group, thus leaving the plaintiff without a remedy . . . ." Keeton, *supra*, § 41, at

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[1] "Resp't Br." refers to the Brief of Respondent Amy Unknown; "S.G. Br." refers to the Brief of Respondent United States; "Pet'r Br." refers to the Opening Brief of Petitioner Paroline.

268-69 (emphasis added). Mr. Paroline does not stand in a "like relationship" to other defendants who have harmed Amy and thus contributed to her losses. Moreover, recognition of his status in this regard will certainly not absolve other defendants of liability and leave Amy without a remedy.

Mr. Paroline possessed only two images of Amy and, critically, did not distribute them. Multiple courts of appeals have observed that such limited possession alone would not have affected Amy's suffering. See *United States* v. *Monzel*, 641 F.3d 528, 538 (D.C. Cir. 2011) ("[The defendant's] possession of a single image of Amy was neither a necessary nor a sufficient cause of all of her losses. She would have suffered tremendously from her sexual abuse regardless of what [the defendant] did."); see also *Laraneta*, 700 F.3d at 991 ("[W]ithout a finding that [the defendant] was a distributor, it is beyond implausible that the victims would have suffered the harm they did . . . ."). There is no question, however, that the actions of a distributor could easily have the effect of further distribution of Amy's image, multiplying her suffering exponentially. Mr. Paroline is not, therefore, in the same position as other defendants who distributed Amy's image and the Solicitor General's aggregate cause rule does not apply.

Nor is there any principled basis upon which to modify the aggregate cause rule simply to fit the deeply unfortunate circumstances surrounding child pornography. Application of that rule should not be different based upon the underlying crime. In other criminal contexts, where there are tiers of culpability, the United States Sentencing Guidelines call for apportionment in recognition of the remote and tenuous role of mere possessors. Thus, sentencing courts must "make particularized findings" about the

"scope" of each member's participation in the drug conspiracy. See *United States* v. *Green*, 175 F.3d 822, 837 (10th Cir. 1999); U.S. Sentencing Guidelines Manual [hereinafter U.S.S.G] § 1B1.3 cmt. n.2. Section 5E1.1(d) of the Sentencing Guidelines, for example, which requires "community restitution" as part of sentencing for the distribution of controlled substances, applies only to distributors. U.S.S.G. § 5E1.1(d). End users and distributors do not bear similar relationships to the harm caused to a community by the illicit drug trade. Likewise, possessors only, as opposed to distributors of child pornography, do not bear the same relationship to the harms visited upon Amy.

Amy's position is that *any* relationship is enough, no matter how dissimilar those relationships may be. Resp't Br. 7. But that is not the law of restitution in criminal cases, Pet'r Br. 14, and it is not even the law of civil torts as advocated by the Solicitor General. See Keeton, *supra*, § 41, at 268-69. In the end, Amy has failed to show, because she cannot show, that failure to impose a ruinous order of restitution upon Mr. Paroline and others who are truly like him, will result in no meaningful restitution for her at all. A desire to impose a ruinous order upon each and every individual who has anything to do with child pornography in any way is understandable, but has no basis in § 2259, the law of restitution, or in an ordered society. See *Morissette* v. *United States*, 342 U.S. 246, 250-51 n.5 (1952) (noting "'a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime.'" (quoting *Williams* v. *New York*, 337 U.S. 241, 247 (1949)).

II. SECTION 2259 REQUIRES A SHOWING OF PROXIMATE CAUSE BETWEEN A DEFENDANT'S CONDUCT AND A VICTIM'S LOSSES.

The conclusion that subsections (A)-(E) of § 2259(b)(3) each require proximate cause, advocated by the Solicitor General in this case and reached by every court of appeals except the Fifth Circuit,[2] follows directly from a plain reading of the statute, as well as the statute's context and purpose. S.G. Br. 17-18. In response, Amy elides the most natural reading of the statute, which applies the proximate cause requirement to each of the six subsections of § 2259(b)(3). Resp't Br. 18-20. Moreover, any other construction would lead to absurd results, entitling indirect and remote "victims" to seek restitution under circumstances not contemplated by this statute.

The Solicitor General's arguments are further supported by the principle that "[w]hen there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 147 (2012). Prepositive and postpositive modifiers create efficien-

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[2] *United States* v. *Benoit*, 713 F.3d 1, 18-21 (10th Cir. 2013); *United States* v. *Fast*, 709 F.3d 712, 720-22 (8th Cir. 2013); *Laraneta*, 700 F.3d at 989-90; *United States* v. *Burgess*, 684 F.3d 445, 456-58 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 490 (2012); *United States* v. *Kearney*, 672 F.3d 81, 95-96 (1st Cir. 2012), *cert. dismissed*, 133 S. Ct. 1521 (2013); *United States* v. *Evers*, 669 F.3d 645, 658-59 (6th Cir. 2012); *United States* v. *Aumais*, 656 F.3d 147, 153 (2d Cir. 2011); *United States* v. *Kennedy*, 643 F.3d 1251, 1260-61 (9th Cir. 2011); *Monzel*, 641 F.3d at 535-37; *United States* v. *McDaniel*, 631 F.3d 1204, 1208-09 (11th Cir. 2011); *United States* v. *Crandon*, 173 F.3d 122, 125-26 (3d Cir. 1999).

cy; otherwise Congress would have had to draft the statute as follows:

(3) Definition.—For purposes of this subsection, the term "full amount of the victim's losses" includes any costs incurred by the victim for—

(A) medical services relating to physical, psychiatric, or psychological care [incurred] *as a proximate result of the offense*;

(B) physical and occupational therapy or rehabilitation [incurred] *as a proximate result of the offense*;

(C) necessary transportation, temporary housing, and child care expenses [incurred] *as a proximate result of the offense*;

(D) lost income [incurred] *as a proximate result of the offense*;

(E) attorneys' fees, as well as other costs incurred *as a proximate result of the offense*; and

(F) any other losses suffered by the victim as a proximate result of the offense

18 U.S.C. § 2259(b)(3) (italicized language inserted). Our natural speech relies on the same types of postpositive efficiency. We say: "I would like projects X, Y and Z as soon as possible" and do not append "as soon as possible" to each and every one of the projects because the postpositive is readily and immediately understood. Woe unto the subordinate who produces project Z promptly and explains that projects X and Y have not yet been commenced because they were not called for with the same expediency. Similarly, the enumeration of different types of costs in subsections (A)-(E) does not remove these types of costs from the proximate cause analysis, but rather illustrates how

proximate cause is built into the statute by enumerating the types of damages for which proximate cause is most likely to exist. See *Fast*, 709 F.3d at 721-22 ("Congress determined that these restitution offenses *typically* proximately cause the losses enumerated in subsections 2259(b)(3)(A) through (E). Congress did not mean that a *specific* defendant *automatically* proximately causes those losses *in every case*." (emphasis in original)).

Amy then shifts her argument to punctuation, but fails here as well. As with the Fifth Circuit, J.A. 454, Amy focuses on the use of semi-colons to separate the subparts of § 2259(b)(3) because, "[a]s a matter of syntax, a semicolon is typically used to separate 'two or more clauses' that are 'grammatically complete' . . . [and] Congress's use of semi-colons indicates a clear break between each category . . . ." Resp't Br. 27 (internal citation omitted).

Amy's rule does not fit this statute, however. Subparts (A)-(E) are not complete because they do not contain verbs. Rather, the semi-colons are used here for an alternative purpose: as a replacement for commas in "lists . . . [of] items that themselves include commas." Stephen Merriam Foley & Joseph Wayne Gordon, *Conventions & Choices: A Brief Book of Style and Usage* 151 (1986). See also Sidney Greenbaum, *The Oxford English Grammar* 513 (1996) ("[S]emicolons are used . . . to separate phrases when internal commas obscure the major units."). Each subpart in § 2259 has items that themselves require commas, *e.g.*, subsection (C) covers "necessary transportation, temporary housing, and child care expenses; . . . ." Had Congress used commas rather than semi-colons to separate the subparts of § 2259(b)(3), the result would have been an incom-

prehensible and ambiguous mess; instead, it used semi-colons to avoid this confusion.

The Fifth Circuit and Amy therefore cannot successfully distinguish § 2259 from the statute at issue in *Porto Rico Railway, Light & Power Co.* v. *Mor.*, where this Court applied a postpositive modifier to each term in a preceding series. 253 U.S. 345, 348 (1920). The semi-colons in § 2259(b)(3) are the *exact* equivalent of the commas used to separate the list of nouns in the statute examined in *Porto Rico Railway*. The proximate cause requirement therefore applies to parts (A)-(E) of § 2259(b)(3), just as the postpositive modifier applied to each term in the preceding series in that case.

Amy further attempts to avoid a proximate cause requirement by asserting that the Fifth Circuit correctly "follow[ed] applicable tort law principles—i.e., the principles providing ample compensation to victims of intentional torts." Resp't Br. 8, 35-37. Yet the analogy between Mr. Paroline's crime and "obvious intentional torts," *id.* at 37, such as those that "involve physical invasions of their victims' bodily integrity," *id.*, is neither neat, nor apt.

Section 2252, the statute to which Mr. Paroline pled guilty, requires that a defendant "knowingly" possess images like Amy's. 18 U.S.C. § 2252(a)(4)(B).[3] Amy acknowledges this mens rea requirement, but fails to acknowledge that "knowingly" is different from "intentionally," or "willfully," as is required for an *intentional* tort. Resp't Br. 37. See, *e.g.*, *Restate-*

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[3] At the time of Mr. Paroline's crime, § 2252(a)(4)(B) prohibited "knowingly possess[ing] . . . 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction" that "involves the use of a minor engaging in sexually explicit conduct . . . ." 18 U.S.C. § 2252(a)(4)(B) (2008).

ment (Second) of Torts § 652B (1977) (requiring *intentional* invasion of seclusion). Intent is present when a defendant "has a purpose to accomplish [a specific result]" or "knows to a substantial certainty that the defendant's actions will bring about the result." Dan B. Dobbs, *The Law of Torts* § 24 (2000).

The elements of intentional torts require direct and *intended* action against a person. For example, the intentional tort of battery involves an intentional bodily contact. *Id.* at § 28. Even intentional torts that involve no physical contact, such as invasion of privacy, still require an "intentional[] intru[sion], physically or otherwise . . . ." *Restatement (Second) of Torts* § 652B (1977). Section 2252(a)(4)(B), by contrast, requires no such intentional act, only that the defendant's *possession* is not the result of accident, mistake or neglect. For that reason alone, it should not be analyzed in parallel with intentional torts. Mr. Paroline could have unintentionally—indeed, *accidentally*—downloaded two of Amy's images, become aware of them later, and still be convicted under that statute. While Amy attempts to draw the Court's attention to linguistic similarities between § 2259[4] and other sections of the criminal code that are more closely analogous to intentional torts, these purported similarities neglect the reality that the elements of knowing possession are fundamentally different than an intentional or willful act designed to cause a specific type of harm. Resp't Br. 36-37.

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[4] Amy's focus on comparing § 2259, not § 2252, to intentional torts is likewise misguided. Section 2252 outlines the elements of Mr. Paroline's crime, which are similar to the elements of a tort (though not, as Amy contends, an intentional tort). Section 2259 describes restitution procedures to be followed after a court finds a criminal offense in violation of Ch. 110—§ 2259 itself is not at all analogous to an intentional tort.

Amy's attempt to remove the proximate cause requirement from § 2259, Resp't Br. 17-18, would lead to bizarre results that would stretch the statute far beyond its original purpose of compensating the victims of child pornography. Under this reading, a person would be entitled to restitution for any loss factually caused by a Chapter 110 crime, no matter how unforeseeable or remote this loss. As the Solicitor General correctly points out, a victim's future employer could seek restitution for "lost income" if the employer loses customers because she missed several days of work as a result of emotional trauma. S.G. Br. 33. Likewise, Amy could seek restitution for losses that are far removed from a defendant's offense, connected only by a thin chain of but-for causation, such as medical expenses incurred because of a car accident on the way to her therapist's office. S.G. Br. 33.

Amy contends that restitution for such remote victims is foreclosed because their losses would only fall under § 2259(b)(3)(F) ("other losses"), and that provision alone requires proximate causation under her misreading of the statute. Resp't Br. 41 n.15. But there are myriad—and attenuated—losses that would fit squarely within other subparts—which, per Amy—do not require proximate causation. The Solicitor General offers a hypothetical in which a child pornography collector's computer transmits a computer virus that damages another person's computer. S.G. Br. 33. In this case, the victim of the computer damage could seek restitution for a variety of costs under § 2259(b)(3)(D) for example, if not required to show proximate cause. These might include lost income under § 2259(b)(3)(D) if the damage prevented the victim from using the computer in his business, or even if the virus destroyed a job application, causing the victim to miss the application deadline and thus

forego a job opportunity. Or the victim might seek restitution under § 2259(b)(3)(A) if the computer virus destroyed the victim's important business records or sentimentally important videos or photographs, and he required psychiatric counseling to cope with the loss; the cost of this counseling would be covered under § 2259(b)(3)(A). Or perhaps the victim, upon seeing his files destroyed, smashes his hand through a wall in a fit of rage; his medical services would be covered under the same subsection, as "intervening" or "superseding" causes are of no consequence once the proximate cause requirement is removed. *Monzel*, 641 F.3d at 537 n.7.[5]

Restitution for these types of incidents under a statute intended to provide full compensation of losses for the true victims of child pornography crimes is illogical. By correctly reading the proximate cause requirement to apply to all costs incurred by a victim under § 2259, this Court can avoid these absurd results while preserving the statute's intended purpose.

III. MR. PAROLINE'S OFFENSE IS NOT A PROXIMATE CAUSE OF AMY'S LOSSES.

While Amy and the Solicitor General disagree on whether proximate cause is required under § 2259, they nonetheless both contend that, if proximate cause is a requirement, it is present in this case.

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[5] These examples are not only hypothetical assertions. *See* Pet'r Br. 36 (citing *United States* v. *Hayes*, 135 F.3d 133 (2d Cir. 1998)). In addition, as explained in Mr. Paroline's opening brief, if the Court adopts Amy's tortured construction of this statute, it would affect not just § 2259, but also all other statutes listed in § 5E1.1 of the U.S. Sentencing Guidelines Manual. *See* U.S.S.G. 5E1.1(a)(1) (requiring restitution "for the full amount of the victim's loss, if such order is authorized under 18 U.S.C. § 1593, § 2248, § 2259, § 2264, § 2327, § 3663, or § 3663A, or 21 U.S.C. § 853(q)").

Resp't Br. 59; S.G. Br. 37. Both are incorrect. See *CSX Transp., Inc.* v. *McBride*, 131 S. Ct. 2630, 2642 (2011) (noting formulations of "proximate cause" including "the 'probable,' or 'natural and probable,' or 'foreseeable' consequence test."); see also *Pickett* v. *RTS Helicopter*, 128 F.3d 925, 929 (5th Cir. 1997) (holding that proximate cause includes "'any cause which, in natural and continuous sequence, unbroken by any efficient, intervening cause, produces the result complained of and without which the result would not have occurred.'" (quoting *Graham* v. *Amoco Oil Co.*, 21 F.3d 643 (5th Cir. 1994))).

The Solicitor General acknowledges that "difficulties may arise at the margin" in applying the proximate cause test to criminal restitution cases under § 2259, but contends that this case falls comfortably within those margins. S.G. Br. 37. Mr. Paroline's case, however, *is* such a marginal case—indeed, it is difficult to conceive of an assessment of damages closer to the statute's margin than approximately $3.4 million for the possession (and not distribution) of two images on his computer alone. The Solicitor General, in claiming that a defendant like Mr. Paroline who possesses only a few images falls comfortably within proximate cause margins, S.G. Br. 37, offers a mere tautology. On this reasoning, there would be no defendant in a possession case who did not satisfy the proximate cause standard.

A far clearer situation than Mr. Paroline's, "fall[ing] comfortably within any reasonable causal limit," is that of a distributor of Amy's images. S.G. Br. 37. As explained by the Seventh Circuit: "[W]ithout a finding that [the defendant] was a distributor, it is beyond implausible that the victims would have suffered the harm they did had [the defendant] been the only person in the world to view

pornographic images of them." *Laraneta*, 700 F.3d at 991. Said differently, while a single distributor may cause significant injury to a victim (by "contribut[ing] to those images 'going viral'" on the internet), a single possessor, like Mr. Paroline, cannot. *Id.* Although the Seventh Circuit's discussion of the relationship between distributors and possessors was used to "determine *what* the defendant caused," its logic can easily be extended to the proximate cause context: if a possessor could not have caused the injury to the victim at all, as the Seventh Circuit concluded, he certainly cannot be the proximate cause of it. *Id.* (emphasis in original). Consistent with the Seventh Circuit's opinion, Mr. Paroline could not possibly have caused such an enormous amount of damage to Amy had he been the only person to see the images, since her injury worsens with each person that views them. See J.A. 60; J.A. 84. Because he could not have been the cause of all of Amy's damages, he cannot logically be the proximate cause of them.

The *Laraneta* opinion also provides a cogent answer to Amy's "two fires" analogy, which posits that two people who independently set fire to a house are both liable for damage to the burned-down house. Resp't Br. 61. As *Laraneta* points out, the dual fire makers are analogous to the *distributors* of Amy's images, not the possessors. 700 F.3d at 992. The distributors, like the fire makers, take action that, even without thousands of other distributors, could foreseeably cause injury to Amy. By contrast, without tens of thousands of other *possessors* in addition to Mr. Paroline, Amy's harm would likely be minimal (perhaps, for instance, the "trifling amount" suggested by Amy as the amount caused by Mr. Paroline). Resp't Br. 65; see also *Laraneta*, 700 F.3d at 992 (noting that the harm suffered would have been much less if only one per-

son had viewed the images, rather than thousands). A more complete view of the two fires analogy is that the distributors of Amy's images are the fire starters, while a single possessor like Mr. Paroline is analogous to a passerby who flicks a cigarette into an already roaring blaze. To hold such a person liable for all harm caused by the fire would be absurd; so too would it be absurd to find Mr. Paroline's actions to be the proximate cause of all of Amy's injuries.

Amy attempts to distinguish between *Laraneta*'s view of harm and her own view of losses, declaring that while her psychological harm might be lessened by fewer possessors viewing her images, her losses would not be. Resp't Br. 63. As a threshold matter, that contention only serves to show that the perpetrators of the original crimes against her are the cause-in-fact of her losses, and not those that only possessed images. Further, the contention is contrary to both the record and common sense. As she and her psychologist attested, Amy's losses are predicated on the harm she has suffered, which is directly related to the number of people who have viewed her images. Resp't Br. 3. And if she suffered less harm (as she admits she would if fewer people had viewed her images), her losses would decline proportionately. Resp't Br. 63. Taking that point to its logical termination (as the Seventh Circuit did), if Amy's images had been viewed by only Mr. Paroline, she would have suffered much, much less harm. See also *Laraneta*, 700 F.3d at 991. As one among many, Mr. Paroline could not have proximately caused all of Amy's losses: instead, he is only the proximate cause of whatever incidental harm Amy suffered as a result of his possession of two images.

IV. JOINT AND SEVERAL LIABILITY IS INAPPROPRIATE AND UNWORKABLE.

The joint and several liability imposed by the Fifth Circuit is procedurally untenable and lacks statutory support. S.G. Br. 42-43. A plain reading of § 2259 does not require the court to hold Mr. Paroline responsible for the full loss inflicted on Amy by the cumulative effect of many offenders. *Id.* at 43. Only losses by a person directly or proximately harmed as a result of the defendant's offense should be entitled to restitution. *Id.* Furthermore, the Fifth Circuit's reliance on 18 U.S.C. § 3664 is misplaced. S.G. Br. 44. Finally, the usage of joint and several liability is "extraordinarily clumsy" and would lead to practical difficulties in the coordination of payment from defendants in various courts across the country. S.G. Br. 45 (quoting *Laraneta*, 700 F.3d at 993).

The Second Circuit recently addressed this issue in *United States* v. *Lundquist*, and specifically disagreed with the Fifth Circuit's conclusion. 731 F.3d 124, 141-42, 142 n.18 (2d Cir. 2013). The Second Circuit noted that while "joint and several liability is an appealing option," it would only be appropriate in a civil action. *Id.* at 141. The court concluded that an order of joint and several liability is prohibited by §§ 2259 and 3664 "[i]f the district court lacks the power to 'make each defendant liable for payment of the full amount'—because it does not have jurisdiction over all of the responsible parties—the plain language of the statute leaves the court only one option: to 'apportion liability among the defendants.'" *Id.* at 141-42 (quoting 18 U.S.C. § 3664(h)). The court therefore concluded that § 3664(h) "does not authorize ordering restitution on a joint and several basis with other individuals who are not before the court (or included in the same indictment)." *Id.* at 142. Section 3664(h)

thus implies that joint and several liability may be imposed only when a single district judge is dealing with multiple defendants in a single case (or indictment); the law does not contemplate the imposition of joint and several liability to defendants in different cases, before different judges, in different jurisdictions around the country.

To determine a restitution order as part of a sentence that is appropriate to Mr. Paroline's actions, courts should determine each defendant's liability based on the proportionate share of the harm for which he is responsible, as the Solicitor General proposes in its brief. S.G. Br. 47-49. Liability should be determined using a defined set of factors including the number of defendants,[6] whether the defendant produced or distributed images, how many images the defendant had, and so forth. In addition, under 18 U.S.C. § 3664(e), the prosecutor must prove by a preponderance of the evidence that a reward of restitution is required once it proves that an individual is a victim of the offense. These factors would show that minor possessors, like Mr. Paroline, are not similarly situated to distributors and thus should not share equal liability.

The Solicitor General criticizes the District Court's failure to award any restitution from Mr. Paroline by simply assuming the accuracy of Amy's restitution

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[6] There is no basis for the Solicitor General's suggestion that the number of defendants in any such formula should be the number of defendants against whom restitution has been ordered. That number is affected by the caprice of agreements by individual prosecutors not to seek restitution in the course of plea bargaining and by Amy's withdrawals of 80% of her claims against defendants for reasons of her own choosing. At a minimum, the number of defendants should be at least the number of defendants of whose crime Amy has received notice.

demand and ignoring the District Court's careful assessment of the specific circumstances of Mr. Paroline's case. S.G. Br. 41-42. After considering expert reports from both parties, the District Court found that there was no causal connection. J.A. 230. ("None of the damages for which "Amy" is now seeking restitution flow from anyone telling her specifically about Mr. Paroline or telling her about his conduct which was the basis of the prosecution in this case.") The District Court conducted the evidentiary analysis envisioned by the Solicitor General, and found that the prosecutor had not met his burden of proving what amount of damages were caused by Mr. Paroline's conduct. The District Court's determination should therefore receive the deference due when that court exercises its "gatekeeper function," with respect to experts, and its unique capacity to judge the credibility of the presentations. C.f. *Koon* v. *United States*, 518 U.S. 81, 98 (1996).

V. A PROXIMATE CAUSE DETERMINATION IS NECESSARY TO AVOID CONSTITUTIONAL PROPORTIONALITY CONCERNS.

Holding all defendants jointly and severally liable for the entire amount of Amy's damages without determining that their actions proximately caused those injuries and commensurate losses would raise constitutional concerns regarding the proportionality of Mr. Paroline's punishment. The Eighth Amendment requires that criminal sanctions be rationally related and proportional to the defendant's criminal conduct. See *Solem* v. *Helm*, 463 U.S. 277, 284 (1983) ("The Eighth Amendment . . . prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed."). A restitution penalty of $3.4 million is, by any measure, an extreme pun-

ishment for the possession of two images, and would not comport with the Eighth Amendment's requirements.

Amy argues that the Eighth Amendment should not apply because restitution is remedial and not a penalty. Resp't Br. 33. For a defendant, however, there is no discernible difference between an order of restitution and a criminal fine. "[F]ederal restitution is a statutory penalty." Catherine M. Goodwin, *Federal Criminal Restitution* § 2:3 (2013). Statutory provisions control courts' decisions to enforce restitution and the size of restitution courts may impose in federal criminal cases. *Id.* "Thus, a restitution order cannot be imposed for loss not directly attributable to the offense conduct for which the defendant is convicted." *Id.*

Whether the Eighth Amendment applies to ruinous orders of restitution is a constitutional question that the Court need not address to decide this case. Mr. Paroline's construction of § 2259 eliminates Eighth Amendment doubts because it would require prosecutors to demonstrate that Mr. Paroline is the cause-in-fact or the proximate cause of Amy's injuries and losses. By contrast, Amy's construction of the statute would result in the per se imposition of joint and several liability for all of Amy's injuries and losses, and thereby raise proportionality concerns. In accordance with the doctrine of constitutional avoidance, the Court should adopt Mr. Paroline's construction and dispense with these proportionality concerns. See *Clark* v. *Martinez*, 543 U.S. 371, 381 (2005). Under that doctrine, the Court accepts a plausible constitutional interpretation of the statute, "resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Id.*

CONCLUSION

For the foregoing reasons, the decision of the Fifth Circuit granting mandamus should be reversed and the opinion of the District Court should be upheld.

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DOYLE RANDALL PAROLINE,
Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,
Respondents.

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PETITIONER'S SUPPLEMENTAL BRIEF AFTER ARGUMENT

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SUPPLEMENTAL BRIEF FOR PETITIONER PAROLINE AFTER ARGUMENT

1. Amy and the Solicitor General argue that this Court's recent decision in *Burrage* v. *United States*, 134 S. Ct. 881 (2014), does not necessitate finding a but-for causation requirement in 18 U.S.C. § 2259. S.G. Letter, Feb. 19, 2014 ("The government agrees with Amy that the Court's decision in *Burrage* neither dictates the appropriate causation standard for restitution awards under 18 U.S.C. [§] 2259, nor speaks to whether the requisite causation standard has been satisfied here."). But *Burrage* addressed language very similar to the language at issue here. In *Burrage*, this Court interpreted the following language from 21 U.S.C. § 841(b)(1)(C): "death or serious bodily injury *results from* the use of such substance." *Burrage*, 134 S. Ct. at 885 (emphasis added). Here, the relevant language requires the same causal relationship between a defendant's conviction and mandatory restitution in three separate instances: 18 U.S.C. § 2259(c) defines "victim" as "the individual harmed *as a result of* a commission of a crime;" § 2259(b)(3)(F) requires losses be the proximate result of the offense; and § 2259(b)(2) explains courts should award restitution in accordance with 18 U.S.C. § 3664, which requires the prosecution to demonstrate "the amount of the loss sustained by a victim *as a result of* the offense . . . ." 18 U.S.C. § 3664(e) (emphasis added).

In *Burrage*, the Court relied on the "traditional background principles" that inform statutes using "results from" or similar language such as "because of," "based on," and "by reason of." *Burrage*, 134 S. Ct. at 889. These principles require a showing of but-for causation. Additionally, the Court noted that state

courts "interpret similarly worded criminal statutes in the same manner." *Id.* at 889 (noting that "results in," "because of," and "as a result of" have all required but-for causation in state courts). The phrase "as a result of" in §§ 2259(b)(3)(F), 2259(c) and 3664(e) should likewise require but-for causation.

2. The Court in *Burrage* rejected the "contributing factor" theory of causation, *Burrage*, 134 S. Ct. 890-91, just as the Court refused to include anything beyond the offense of conviction in calculating losses for restitution orders in *Hughey* v. *United States*, 495 U.S. 411, 420 (1990). Yet this is the same causation argument presented by both Amy and the Solicitor General here. The *Burrage* decision rests not upon any defined term peculiar to that statute, but upon the ordinary meaning of the words "results from." *Id.* at 887. The Court held "[w]here there is no textual or contextual indication to the contrary, courts regularly read phrases *like* 'results from' to require but-for causality." *Id.* at 888 (emphasis added). Specifically, the Court emphasized that "it is one of the traditional background principles 'against which Congress legislate[s],' . . . that a phrase such as 'results from' imposes a requirement of but-for causation." *Id.* at 889 (internal citation omitted) (quoting *Univ. Tex. Sw. Med. Ctr.* v. *Nassar*, 133 S. Ct. 2517, 2525 (2013)). Had Congress intended § 841(b)(1)(C) to only require contributing causation, it would have written the statute with language that did not "import[ ] but-for causality." *Burrage*, 134 S. Ct. at 891.[1]

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[1] In *Burrage*, the Court held that "the drug distributed by the defendant is not an independently sufficient cause of the victim's death or serious bodily injury," and therefore the defendant is not liable under the enhancement provision "unless [the victim's use of the drug] is a but-for cause of the death or injury." 134 S. Ct. at 884. In the same way, the but-for cause test

In requiring but-for causation, the Court also expressly rejected the "less demanding" and "less well established" Prosser & Keaton conversion theory proposed by the Solicitor General. *Id.* at 890-91; see also S.G. Br. 22 (arguing for "'aggregate' causation" where "the defendants bear[] a like relationship to the harm" and "[e]ach seeks to escape liability for a reason that . . . would likewise protect each other defendant in the group . . . leaving the plaintiff without a remedy . . . ." (alterations original)).

Amy attempts to counter the broadly applicable principles announced in *Burrage* with an invitation to judicial policymaking. She warns that any standard other than contributing cause will let "all of the wrongdoers . . . escape liability . . . ." Resp't Supp. Br. 8-9. The Solicitor General made the same argument in *Burrage*. See Br. for United States at 24, *Burrage*, 134 S. Ct. 881 (No. 12-7515). But *all* wrongdoers here would not escape liability as Amy argues. All defendants convicted of child pornography would face criminal liability. More importantly, the majority of individuals convicted for possession of child pornography—and sentenced under § 2G2.2—also engaged in knowing receipt and/or distribution conduct. U.S. Sentencing Comm'n, *Report to the Congress: Federal Child Pornography Offenses* 146-48 (2012) ("53.1 percent (878) of the 1,654 child pornography offenders sentenced [in Fiscal Year 2010] under §2G2.2 were convicted of possession [of child pornography]. . . . [And] the vast majority of all offenders sentenced under §2G2.2 (1,613, or 97.5%) actually engaged in knowing receipt and/or distribution con-

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was not met here. *See* Presentence Investigation Report ¶ 14, *United States* v. *Paroline*, No. 6:08-cr-61 (E.D. Tex. June 10, 2009). This determination in the PSR was confirmed by the District Court's finding of no proximate causation.

duct."). The fact that §§ 2259(b)(3)(F), 2259(c), and 3664(e) require but-for cause for possession does not prevent victims from receiving restitution from the *vast* number of individuals who actually engage in distribution.

Whether these policy arguments are sound, however, does not matter. The Court emphasized once again in *Burrage*, as it did in *Hughey*, that the role of the Court "is to apply the statute as it is written—even if . . . some other approach might 'accord with good policy.'" *Burrage*, 134 S. Ct. at 892 (internal quotation marks and alterations omitted) (quoting *Comm'r* v. *Lundy*, 516 U.S. 235, 252 (1996)); see also *Hughey*, 495 U.S. at 422 ("[L]ongstanding principles of lenity . . . preclude our resolution of the ambiguity against petitioner on the basis of general declarations of policy . . . ."). "[I]t frustrates rather than effectuates legislative intent . . . to assume that whatever furthers the statute's primary objective must be the law." *Dolan* v. *United States*, 560 U.S. 605, 625 (2010) (Roberts, C.J., dissenting) (quoting *Rodriguez* v. *United States*, 480 U.S. 522, 525-26 (1987) (per curiam)). Even assuming, as the Solicitor General posits, that policy points in a different direction, *Burrage* demonstrates that courts must interpret §§ 2259(c)'s and 3664(e)'s "results from" language according to its plain meaning and not according to the parties', or even the Court's assessment of what constitutes good policy.

3. Amy argues that *Burrage*'s reasoning should not apply in this case because *Burrage* interpreted a statute that imposed criminal liability, while the Mandatory Victims Restitution Act (MVRA) should be interpreted like a tort statute. See Resp't Supp. Br. 2 ("the contributing cause basis for liability is widely recognized" in statutes "involving tort com-

pensation"). This contention is misguided for at least three reasons.

First, Amy overlooks that the MVRA is a criminal, not tort, statute. As the Solicitor General recently recognized, the MVRA incorporates traditional purposes of both criminal and tort law: in addition to victim compensation, "Congress also mandated restitution for certain crimes under the MVRA 'to mete out appropriate criminal punishment for' the offense conduct." Br. for United States, *Robers* v. *United States*, No. 12-9012, 2014 WL 251996, at *40 (U.S. Jan. 21, 2014) (quoting *Pasquantino* v. *United States*, 544 U.S. 349, 365 (2005)). Furthermore, "restitution under the MVRA is *punishment* because the MVRA has not only remedial, but also deterrent, rehabilitative, and retributive purposes . . . ." *United States* v. *Dubose*, 146 F.3d 1141, 1144 (9th Cir. 1998), *cert. denied*, 525 U.S. 975 (1998) (emphasis added). Although the MVRA arguably encompasses *some* tort law principles—namely, compensation for victims—viewing it exclusively as a tort statute ignores much of its purpose, as the Solicitor General argued in *Robers*. The MVRA's multiple purposes do not support a reading that ignores an important "background principle" of *both* criminal and tort statutes: that phrases like "results in" imply a but-for causation requirement.

Second, even if the Court understands the MVRA as a civil statute, the assertion that but-for causation is limited to statutes imposing criminal liability fails to account for large swaths of *Burrage*. Indeed, the Court cited but-for causation requirements in similarly worded tort statutes, *Univ. Tex. Sw. Med. Ctr.* v. *Nassar*, and *Gross* v. *FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009). *Burrage*, 134 S. Ct. at 888-89. In *Nassar*, the Court held that Title VII's antiretaliation provision, which contains the language ("results from"),

"require[s] proof that the desire to retaliate was the *but-for cause* of the challenged employment action." *Nassar*, 133 S. Ct. at 2528 (emphasis added). *Gross* similarly held that the Age Discrimination in Employment Act, another tort statute (using the language "by reason of"), requires that a plaintiff's age be a "*'but-for' cause* of the employer's adverse decision." *Gross*, 557 U.S. at 176 (emphasis added). As the *Burrage* decision shows, the but-for causation requirement is inherent in phrases like "results in" or "results from." *Burrage*, 134 S. Ct. at 889-90. That principle applies with equal force to tort statutes.[2]

Third, the background against which Congress created that language is essential to interpreting the language of § 3664(e). In 1990, this Court decided *Hughey* v. *United States*. *Hughey* interpreted the Victim and Witness Protection Act (VWPA), then 18 U.S.C. §§ 3579-80, which is now §§ 3663-64: "The court, in determining whether to order restitution . . . shall consider the amount of the loss sustained by any victim *as a result of the offense* . . . ." *Hughey*, 495 U.S. at 417 (quoting 18 U.S.C. § 3580(a)). The exact same language appears in § 3664(e). In *Hughey*, the Court rejected the Solicitor General's policy arguments for expanded consideration of conduct outside of the defendant's convicted

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[2] Amy recognizes that but-for causation can apply even in tort cases when she further attempts to distinguish the causation standard in tort statutes between negligent torts (which require but-for causation) and intentional torts (which, according to Amy, require only contributing causation). Resp't Supp. Br. 9-10. This argument overlooks that the torts involved in *Nassar* and *Gross* (employment discrimination torts) are intentional. Further, as discussed in Petitioner's initial Reply Brief, the *mens rea* requirement (knowingly) in this case falls short of the requisite state of mind in intentional torts (intent). *See* Pet'r Reply Br. 8.

offense, and was adamant that the scope of restitution must be tied strictly to the crime of conviction. *Id.* at 420 ("[T]he loss caused by the conduct underlying the offense of conviction establishes the outer limits of a restitution order."); see also *id.* at 422 (holding that, even if the statutory language were ambiguous, "longstanding principles of lenity . . . preclude our resolution of the ambiguity against petitioner on the basis of general declarations of policy in the statute and legislative history.").

In 1996, in the wake of *Hughey*, Congress amended the VWPA to create the MVRA, including § 3664(e). By doing so, it codified *Hughey*, incorporating a but-for causal link between the crime of conviction and losses sustained by a victim. The Court's observation in *Burrage*, that Congress could have written the statute to "impose a mandatory minimum when the underlying crime 'contributes to' death or serious bodily injury, or adopted a modified causation test tailored to cases involving concurrent causes" but chose not to, applies here. *Burrage*, 134 S. Ct. at 891. Congress created in the MVRA a uniform standard of proof consistent with this Court's precedent. Amy's argument, therefore, boils down to a policy argument that *both* Congress *and* this Court have repeatedly considered and rejected by writing and interpreting statutes to include a but-for causation requirement in a variety of contexts.

4. Even if the language of § 2259 does not explicitly require but-for causation, the rule of lenity mandates that it be interpreted as requiring but-for causation. The rule of lenity requires that "construction of a criminal statute" like § 2259 "must be guided by the need for fair warning . . . ." *Crandon* v. *United States*, 494 U.S. 152, 160 (1990). It therefore "demand[s] resolution of ambiguities in criminal statutes in favor of

the defendant . . . ." *Hughey*, 495 U.S. at 422 (applying the rule of lenity in the context of a restitution order); see also *Moskal* v. *United States*, 498 U.S. 103, 107-08 (1990) ("the touchstone of the rule of lenity is statutory ambiguity" (internal quotation marks omitted) (quoting *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980))).

In *Burrage*, Justices Ginsburg and Sotomayor disagreed with the Court's holding that "results from" statutory language always requires a showing of but-for causation, but concurred in the judgment, explaining that the rule of lenity precluded interpreting the statute against the defendant. As Justice Ginsburg wrote, "where there is room for debate, one should not choose the construction 'that disfavors the defendant.'" *Burrage*, 134 S. Ct. 892 (Ginsburg, J., concurring) (quoting *Id.* at 891).

For the same reason, if the Court finds § 2259 to be ambiguous, it should apply the rule of lenity and refuse to give it "a meaning that is different from its ordinary, accepted meaning, and that disfavors the defendant." *Id.* at 891. Accordingly, this Court should read "as a result of" to demand the same "but-for" causation as was required in *Burrage*.

CONCLUSION

For the foregoing reasons, the decision of the Fifth Circuit granting mandamus should be reversed and the opinion of the District Court should be upheld.

Respectfully submitted,

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SUPPLEMENTAL BRIEF

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No. 12-8561

In the Supreme Court of the United States

DOYLE RANDALL PAROLINE, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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SUPPLEMENTAL BRIEF FOR THE UNITED STATES

In *Burrage* v. *United States*, 134 S. Ct. 881 (2014), this Court held that the 20-year mandatory minimum sentence for unlawfully distributing a drug when "death or serious bodily injury results from the use of such substance," 21 U.S.C. 841(a)(1) and (b)(1)(A)-(C), does not apply "when use of a covered drug supplied by the defendant contributes to, but is not a but-for cause of, the victim's death or injury"—"at least where use of the drug distributed by the defendant is not an independently sufficient cause of the victim's death or serious bodily injury." 134 S. Ct. at 885, 892. *Burrage*'s analysis of causation does not affect the disposition of this case: possessors of child pornography are the actual cause of harm to victims and must be ordered to pay restitution.

In contrast to the statute at issue in *Burrage*, which concerned an element of a criminal offense

carrying a mandatory prison term, causation-in-fact of harm can be established in child-pornography restitution cases under "aggregate causation" principles, which are an established feature of the tort-law backdrop for 18 U.S.C. 2259. Also in contrast to *Burrage*, once causation is shown, the amount of the sanction (restitution) can be apportioned to reflect the defendant's relative contribution to the victim's losses. See U.S. Br. 47-49; U.S. Reply Br. 18-22. But even if the Court declined to recognize aggregate causation in light of *Burrage*, "but-for" causation can be satisfied here: each possessor of a victim's images causes her harm, and it should not be necessary to establish the precise degree of incremental loss in order to justify restitution of a reasonably apportioned amount. Under either approach, a victim should not be denied restitution because she is harmed by 1000 individuals rather than one.

A. Aggregate Causation Is An Accepted Theory Of Tort Law That Applies To Restitution For Child Pornography Possession Offenses

In *Burrage*, this Court rejected a "contributing cause" theory of factual causation in the context of a 20-year mandatory minimum sentence triggered when "death or serious bodily injury results from the use of" a covered drug supplied by the defendant, 21 U.S.C. 841(b)(1)(C). 134 S. Ct. at 887-892. The Court explained that, "[i]n the usual course," a defendant's wrongful conduct is an "actual cause" of an injury if "the harm would not have occurred in the absence of—that is, but for—the defendant's conduct." *Id.* at 887-888 (citations and internal quotation marks omitted); see *id.* at 889 (describing "but-for" causation as a "traditional background principle[]"). The Court,

however, also recognized that "courts have not *always* required strict but-for causation" and that "contextual indication[s]" to the contrary may make an alternative to a "but-for" standard appropriate. *Id.* at 888, 890. The contextual differences between the statutory schemes in this case and *Burrage* demonstrate that Congress intended to allow an aggregate causation showing to justify restitution for child-pornography possession offenses.

1. The causation language at issue in *Burrage* ("results from") defines a crime that requires a 20-year mandatory minimum sentence. See 21 U.S.C. 841(a)(1) and (b)(1)(C). To establish criminal liability, the government must prove its case at trial beyond a reasonable doubt. *Burrage*, 134 S. Ct. at 892. And the consequence of conviction is increased punishment in the form of a mandatory minimum sentence that cannot be apportioned to reflect the defendant's relative culpability or the presence of other contributing causes.

The causation language at issue here ("as a result of") appears in a restitution statute requiring sentencing courts to order defendants convicted of child-pornography offenses to pay restitution to their victims. 18 U.S.C. 2259(a), (b)(4)(A) and (c), 3664(e). To justify restitution, the government must prove its case during a sentencing hearing by a preponderance of the evidence. 18 U.S.C. 3664(e). Restitution, unlike a sentence of imprisonment, serves important compensatory purposes. And sentencing courts have discretion to award restitution in an amount that acknowledges the contribution of others and that is proportionate to the defendant's relative contribution to the victim's collective losses. See pp. 10-11, *infra*.

Given those contextual differences, the government can establish that a possessor of child pornography is a cause-in-fact of the victim's harm by showing that the defendant belongs to a class of similarly situated individuals who have collectively caused her harm by possessing images depicting her sexual abuse. In contrast to difficulties in assessing "probabilities and percentages" to determine whether death resulted from a drug trafficker's distribution of a drug that combined with others to cause death—which *Burrage* found irreconcilable with the reasonable-doubt standard and notice issues in criminal cases, 134 S. Ct. at 892—applying an aggregate-cause standard here raises no such concerns. Congress has already determined that the contribution of defendants like petitioner is "important enough" and is not "too insubstantial" (*ibid.*) to warrant restitution because it mandated restitution once it is established that a person is a victim of an offense. 18 U.S.C. 2259(a), (b)(4)(A) and (c); see U.S. Br. 15-17. And when a defendant possesses child pornography, the child depicted is indisputably a victim of the offense. See *Osborne* v. *Ohio*, 495 U.S. 103, 111 (1990); *New York* v. *Ferber*, 458 U.S. 747, 759 (1982).

2. In *Burrage*, the Court declined to adopt the "contributing" cause approach that the government endorsed, after noting that several courts had adopted it, but the American Law Institute's Model Penal Code had not, 134 S. Ct. at 890, and, although "[o]ne prominent authority on tort law" had advanced that rule, the authors acknowledged in a footnote that "no judicial opinion ha[d] approved th[at] formulation," *ibid.* (brackets in original) (quoting W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 41 n.40,

p. 268 (5th ed. 1984) (*Prosser & Keeton*)). The United States has relied on that formulation here, U.S. Br. 21, and *Burrage* does not foreclose its adoption in the restitution context. Although *Prosser & Keeton*'s *formulation* was novel, the principle itself was not: both commentators and courts have found actual causation in circumstances where the defendant's conduct was neither a "but-for" nor an "independently sufficient" cause of the plaintiff's harm, but where each defendant contributed to the harm and declining to find actual causation would exonerate the entire class. Given the tort-like aspects of restitution and the nature of child-pornography offenses, applying that principle best effectuates Congress's intent under Section 2259. U.S. Br. 19-27.

A number of prominent authorities on tort law (beside *Prosser & Keeton*) have advanced a comparable aggregate causation approach. See 1 Dan B. Dobbs et al., *The Law of Torts* § 189, p. 635 (2d ed. 2011); Richard W. Wright, *Causation in Tort Law*, 73 Cal. L. Rev. 1735, 1774, 1788-1803 (Dec. 1985). And while "the American Law Institute declined to do so in its Model Penal Code" (*Burrage*, 134 S. Ct. at 890), it adopted precisely that alternative rule of causation in the tort-law context. See 1 Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 27, Reporters' Note cmt. g (2005) (Even though "none of the alternative causes is sufficient by itself, * * * together they are sufficient and perhaps necessary elements of multiple sufficient causal chains.").

Moreover, "[a]lthough no judicial opinion ha[d] approved *this formulation*" as of 1984, the "results reached in reported cases [we]re almost uniformly

consistent with it." *Prosser & Keeton* § 41 n.40, p. 268 (emphasis added). In *Chipman* v. *Palmer*, 77 N.Y. 51 (1879), for example, the defendant, who owned a boarding house upstream from the plaintiff's boarding house, was found liable for discharging sewage into the stream which, along with the discharge from other homes and large hotels, caused a "stench" that injured the plaintiff's business. *Id.* at 52. As the court explained in *United States* v. *Luce*, 141 F. 385 (C.C.D. Del. 1905), citing a number of other nuisance cases:

> It is no answer to a complaint of nuisance that a great many others are committing similar acts of nuisance upon the stream. Each and every one is liable to a separate action, and to be restrained. * * * The extent to which the [defendant] has contributed to the nuisance, may be slight and scarcely appreciable. Standing alone, it might well be that it would only, very slightly, if at all, prove a source of annoyance. And so it might be, as to each of the other numerous persons contributing to the nuisance. Each standing alone, might amount to little or nothing. But it is when all are united together and contribute to a common result, that they become important as factors, in producing the mischief complained of.

Id. at 412 (citation and internal quotation marks omitted); see also *Indianapolis Water Co.* v. *American Strawboard Co.*, 57 F. 1000, 1003-1004 (C.C.D. Ind. 1893); *Warren* v. *Parkhurst*, 92 N.Y.S. 725, 725-727 (Sup. Ct. 1904), aff'd, 93 N.Y.S. 1009 (App. Div. 1905), aff'd, 78 N.E. 579 (N.Y. 1906). Those cases are fully consistent with an *aggregate* "but-for" theory of causation.

Between 1984 and Section 2259's enactment in 1994, several other courts reached results consistent with *Prosser & Keeton*'s alternative rule and some expressly adopted its precise formulation. These more modern cases generally arose in the context of asbestos liability, where it was often difficult (if not impossible) to prove the extent to which exposure to each defendant's product caused the plaintiff's illness or death. The impact of asbestos exposure is cumulative, the resulting illnesses develop over time, and multiple exposures to multiple defendants' products in unknown amounts is the norm. Faced with such uncertainty, courts did not require plaintiffs to prove that they would not have been harmed "but for" exposure to the individual defendant's product or that the defendant's product was an independently sufficient cause of their harm. See, *e.g.*, *Ingram* v. *Acands, Inc.*, 977 F.2d 1332, 1340-1341, 1343-1344 (9th Cir. 1992); *Spaur* v. *Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854, 858-861 (Iowa 1994); *Eagle-Picher Indus.* v. *Balbos*, 604 A.2d 445, 459 & n.11 (Md. 1992).[1]

The limited number of judicial opinions and the concentration of those opinions in particular areas reflects that "but-for" causation generally is the correct test and that an alternative formulation is only needed in circumstances where mechanical application of that test (or an independently sufficient alternative) fails to achieve a sound result. That is the case here. Background principles of tort law provide a solution that effectuates Congress's clear intent to compensate victims and to make defendants understand concretely

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[1] Although those cases generally use a "substantial factor" formulation, it is clear that the courts are not equating "substantial factor" with an "independently sufficient" cause.

that possessing child pornography causes real harm to real children.

B. An Incremental "But-For" Causation Standard May Be Appropriate If Properly Framed

If the Court declines to adopt an aggregate causation standard, it should not find actual cause missing in cases like this. That result would be contrary to Congress's intention to mandate restitution for a crime that, Congress knew, would often involve countless possessors of a victim's images. See *Ferber*, 458 U.S. at 759 n.10 (referring to "the mass distribution system for child pornography"); Child Abuse Victims' Rights Act of 1986, Pub. L. No. 99-500, § 702(1), 100 Stat. 1783-84 (reproduced at 18 U.S.C. 2251 note) ("child exploitation has become a multi-million dollar industry"). Instead, it should adopt a "but-for" standard that properly accounts for what would otherwise be an insurmountable burden of proof. The government has explained that a particularized "but-for" causation standard is unworkable in this context to the extent it requires the government to prove, for example, "that petitioner's specific conduct caused Amy to miss an extra day of work, or to need an additional therapy session." U.S. Br. 24-27. That reality does not mean, however, that each defendant has not caused Amy some additional, incremental harm, even if it cannot be precisely ascertained.

Each violation of the child-pornography possession statute *does* cause Amy some degree of harm—at the very least, in the form of an invasion of privacy when a person possesses images of her sexual abuse. U.S. Br. 16-17. And that remains true even if the specific violation cannot be traced to additional losses (*e.g.*, additional therapy sessions). To the extent the

Court declines to adopt an aggregate-causation approach, it would therefore be appropriate to recognize that petitioner (and other defendants like him) are the "but-for" cause of some (albeit immeasurable) amount of harm.

If the Court adopts that approach, however, it should make clear that such incremental "but-for" causation would be established as a matter of law—and would not require particularized proof of harm as a matter of fact. A highly particularized "but-for" (or independently sufficient) causation standard would be an "insuperable barrier" to restitution for victims like Amy. *Burrage*, 134 S. Ct. at 891. If petitioner had not possessed Amy's images, she still would have suffered substantial harm as a result of countless other defendants just like him. And it is practically impossible to know whether her losses would have been slightly lower if one were to subtract one defendant, or ten, or fifty. As the lower courts have recognized, requiring evidence that petitioner's specific conduct caused Amy to miss an extra day of work, or to need an additional therapy session, would impose an insurmountable burden. See J.A. 296 (acknowledging that "but-for" causation erects an "impossible burden"); *United States* v. *Kennedy*, 643 F.3d 1251, 1266 (9th Cir. 2011) ("[I]t is likely to be a rare case where the government can directly link one defendant's viewing of an image to a particular cost incurred by the victim.").

As the government also explained in its opening brief, Congress mandated restitution for victims of child-pornography possession offenses. U.S. Br. 15-16. And Congress did so with full awareness of how the child-pornography marketplace works and of the repetitive and continuing harm inflicted on child vic-

tims by the class of individuals that possess their images. *Id.* at 16-17. In that statutory scheme, it is inconceivable that Congress intended to adopt a causation requirement that renders restitution unavailable for virtually 100% of the victims of child-pornography possession offenses.[2]

C. Amy's Renewed Arguments For Holding Petitioner Responsible For All Of Her Aggregate Losses Are Without Merit

In her supplemental brief, Amy reiterates the argument that defendants like petitioner should be liable for the "full amount" of her aggregate losses. See Supp. Br. 1, 3-5, 9-10. That argument fails for the reasons set forth in the government's opening and reply briefs—*e.g.*, Amy's losses are not "indivisible" and the statute does not require a defendant to pay the "full amount" of losses caused by other defendants. See U.S. Br. 42-47; U.S. Reply Br. 9-18. Rather, reasonable apportionment is the appropriate outcome.

Amy conflates a "contributing cause approach" with liability for the "full amount" of her collective losses. See Supp. Br. 1. One does not flow inexorably from the other. To the contrary, many courts that have recognized or applied a theory of aggregate or contributing cause have rejected joint-and-several liability in favor of apportionment. See pp. 6-7, *supra* (citing cases). Thus, the choice is not all or nothing. And the flexibility of a sentencing court to award

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[2] This result contrasts with *Burrage*, in which the Court noted that the government has proved but-for causation in some "death results" prosecutions and, in any event, the defendant remains liable for the underlying drug crime with "a substantial default sentence." 134 S. Ct. at 891.

restitution in an amount commensurate with the defendant's relative contribution and culpability sharply distinguishes this case from *Burrage*. See *United States* v. *Doe*, 488 F.3d 1154, 1159-1160 (9th Cir.) (noting that restitution has never required exactitude or "mathematical precision"), cert. denied, 552 U.S. 964 (2007).

The new authorities Amy cites (Supp. Br. 3-4) do not suggest otherwise. *The "Atlas,"* 93 U.S. (3 Otto) 302, 308-309 (1876), is an example of "but-for" causation because the presence of both ships was necessary for the collision. See U.S. Reply Br. 13-15. *Northup* v. *Eakes*, 178 P. 266, 267 (Okla. 1918), involved a truly indivisible injury (a burned-down barn) caused by the negligent disposal of oil into a stream by multiple defendants. See U.S. Reply Br. 12-13.[3] *Phillips Petroleum Co.* v. *Hardee*, 189 F.2d 205, 211-212 (5th Cir. 1951), addresses when a lost crop constitutes an indivisible injury and finds that, under Louisiana law, defendants may be found jointly and severally liable. But the same court answered the same question the opposite way, under Florida law, more than a decade later, see *Wm. G. Roe & Co.* v. *Armour & Co.*, 414 F.2d 862, 867-871 (5th Cir. 1969), and the later decision provides more apt guidance here, *id.* at 869-870

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[3] The difference between situations in which discharge pollutes a waterway or a plaintiff's land, see, *e.g.*, *Watson* v. *Pyramid Oil Co.*, 248 S.W. 227, 228 (Ky. Ct. App. 1923), and when it causes a fire that destroys a building, is well recognized. See *Prosser & Keeton* § 52, pp. 345-346 & nn. 5-6. In the former circumstance, the damages "must be separated by means of the best proof the nature of the case affords and [each defendant's] liability ascertained accordingly." *Watson*, 248 S.W. at 228.

(explaining basis for apportionment where separate and independent acts "intermingl[e]").

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

MARCH 2014

SUPPLEMENTAL BRIEF

ORIGINAL

Supreme Court, U.S.
FILED
MAY - 8 2013
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IN THE
SUPREME COURT OF THE UNITED STATES

No. 12-8505

MICHAEL WRIGHT,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

No. 12-8561

DOYLE RANDALL PAROLINE,
Petitioner,

versus

AMY UNKNOWN and UNITED STATES,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONER MICHAEL WRIGHT IN REPLY TO AMY UNKNOWN'S RESPONSE TO PAROLINE'S PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

By a filing in Docket No. 12-8561, respondent Amy Unknown opposed Michael Wright's petition for a writ of certiorari in Docket 12-8505. Since Mr. Paroline's and Mr. Wright's petitions are related in that they both seek review of the same circuit court decision, petitioner Wright files this response in both dockets. Unlike Amy, petitioner Wright urges the Court to grant certiorari in both cases and consolidate them.

Wright's case raises a question that Paroline's case does not. In Paroline's case, the Fifth Circuit reversed the district court's denial of restitution to Amy. In Wright's case, the Fifth Circuit affirmed the district court's order that Wright pay Amy over a half million dollars in restitution for all of Amy's mental health damages: those incurred as a result of the actual abuse, those incurred as a result of the original uploading of Amy's images on the internet, those incurred as a result of the distribution of those images and those incurred as a result of all instances of receipt and possession, no matter who committed the offense. Wright and Paroline, notably, were convicted of possession only. Both petitions present the question whether there is a sufficient causal connection between the defendant's possession of the victim's images and the victim's loss to trigger restitution under 18 U.S.C. § 2259. Wright's petition raises the additional question whether § 2259 authorizes a district court to

order one defendant to pay restitution for another person's unrelated conduct, in other words. whether the principle recognized by this Court in *Hughey v. United States*, 495 U.S. 411 (1990), applies to § 2259. This too is the subject of disagreement among the circuits in that the Fifth Circuit, standing alone, interprets "the full amount of the victim's losses," 18 U.S.C. § 2559(b)(1), to encompass all losses, regardless of who caused them. If the Court were to decide that a possessor of child pornography causes losses for which § 2259 mandates restitution, then it also should set the outer limits of such restitution awards by deciding this additional issue. Therefore, both petitions for certiorari should be granted.

Amy raises three objections to granting certiorari in Wright's case. None withstands scrutiny.

1. Amy argues that the Court would need to appoint counsel to argue her position should the Court grant Wright's certiorari petition because Amy was not a party in the district court. Amy's Response, pp. 32-33. Wright, however, urges the Court to grant both his petition and Paroline's and to consolidate the two dockets. Amy then would be a party in the consolidated cases.

2. Although the Fifth Circuit twice refused to enforce the appeal waiver in Wright's plea agreement, Amy resurrects this defunct issue. Amy's Response, p. 32. Contrary to her representation, the issue was not "unresolved." Wright's plea

agreement stated that "the restitution provisions of Sections 3663 and 3663A of Title 18, United States Code, will apply."[1] The only explanation provided by the district court at rearraignment was, "You also may be required to reimburse any victim for the amount of his or her loss under The Victim Restitution Law, if that term is applicable."[2] Since §§ 3663 and 3663A are both limited to restitution for losses proximately caused by the defendant's offense conduct, the Fifth Circuit panel held that "Wright did not knowingly waive his right to appeal a restitution order that is unlimited by the principle of proximate causation." 639 F.3d 679, 683-84 (5th Cir. 2011). Furthermore, Wright's claim on appeal is that the restitution award exceeds the losses caused by his offense conduct. This is a claim that the restitution award exceeds the statutory maximum, which is an explicit exception to the appeal waiver contained in his plea agreement.[3] See *United States v. Chemical & Metal Industries, Inc.*, 677 F.3d 750, 752 (5th Cir. 2012).

The *en banc* Court held that the Government had waived enforcement of the appeal waiver by its curious argument that the appeal waiver barred Wright's appeal only if the Fifth Circuit held that § 2259 restitution was limited to losses proximately

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[1] R. USCA5 p. 52.

[2] R. USCA5 p. 157.

[3] R. USCA5 p.52 ("The defendant . . . reserves the right to appeal any punishment imposed in excess of the statutory maximum.").

caused by the defendant's offense conduct, that is, only if Wright prevailed. Slip op., p.5 n.4. The issue, however, is whether the amount of restitution ordered by the district court exceeded the scope of the restitution available under §§ 3663 and 3663A. Since it did, the appeal waiver did not bar Wright from appealing.

3) Lastly, Amy contends that Wright's case is moot because her lawyer, James Marsh, withdrew Amy's request for restitution by a letter to the District Court Clerk when this case was pending on appeal. Amy's Response, p. 34. In fact, Mr. Marsh's attempted withdrawal of Amy's request was a cynical and ineffective litigation ploy. The June 3, 2011, letter was filed *after* the district court had ordered $529,661 in restitution at Amy's request,[4] *after* a Fifth Circuit panel had held in Paroline's case that § 2259 did not require a showing of proximate causation (except for the catch-all clause in subsection (b)(3)),[5] and *after* the Fifth Circuit panel in Wright's case had called for rehearing *en banc*.[6] It was in Amy's interest to avoid *en banc* review because the panel opinion in *Paroline* bound all other panels in the Fifth Circuit. See, e.g., *United States v. Turner*, 674 F.3d 420, 444 (5th Cir.), cert. denied, 133 S. Ct. 312 (2012). The *en banc* Court, however, was fully aware of Amy's mootness argument

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[4]The district court ordered Wright to pay $529,661 in restitution on December 16, 2009. R. USCA5 p. 93.

[5]See *In re Amy*, 636 F.3d 190, 201 (5th Cir. Mar. 22, 2011).

[6]*United States v. Wright*, 639 F.3d 679, 692 (Apr. 20, 2011) (Davis, J., concurring, joined by King and Southwick, JJ).

and disregarded it. See Letter to Clerk of U.S. Court of Appeals for Fifth Circuit from Assistant Federal Public Defender Robin E. Schulberg (June 9, 2011). As the Government argued, the district court lacked jurisdiction to address Amy's letter because the case was pending on appeal. See United States' Petition for Panel Rehearing (June 3, 2011), p. 8 n.4, citing *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (per curiam) (stating, "The filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.").

Of equal importance to Wright, the circuits are divided on the issue whether a court may order restitution if a victim declines an award. Compare *United States v. Johnson*, 378 F.3d 230, 244-46 (2nd Cir. 2004) (district court must order restitution and obligation survives even if identified victim declines without assigning award), with *United States v. Speakman*, 594 F.3d 1165, 1175-77 (10th Cir. 2010) (restitution may be awarded to victim or victim's estate only); *United States v. Pawlinksi*, 374 F.3d 536, 539-41 (7th Cir. 2004) (district court erred in directing restitution unclaimed by victims to go to Crime Victims Fund). With the law unsettled, Wright could not risk abandoning his appeal.

CONCLUSION

The best way for this Court to provide guidance to the circuits about how to interpret § 2259 is to grant both Paroline and Wright's petitions for certiorari. There are no procedural obstacles in Wright's case that would prevent the Court from so doing.

Respectfully submitted this 8th day of May, 2013,

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of May, 2013, a copy of the foregoing has been served on Brian Klebba and Diane Hollenshead Copes, Assistant United States Attorneys, 650 Poydras Street, 16th Floor, New Orleans, Louisiana, 70130, via hand delivery, and on Donald B. Verrilli, Jr., Solicitor General of the United States, Department of Justice, 950 Pennsylvania Avenue N.W., Washington, D.C. 20530, Paul G. Cassell, University of Utah School of Law, Room 101, 332 S. 1400 East, Salt Lake City, Utah 84112 and Stanley George Schneider, Schneider & McKinney, 440 Louisiana, Suite 2110, Houston, Texas 77002 by placing same in the United States mail, properly addressed and postage prepaid.

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

No. 12-8561

Supreme Court, U.S.
FILED
NOV 19 2013
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In The

Supreme Court of the United States

DOYLE RANDALL PAROLINE,

Petitioner,

v.

AMY UNKNOWN and UNITED STATES,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

AMICUS BRIEF OF THE AMERICAN PROFESSIONAL SOCIETY ON THE ABUSE OF CHILDREN IN SUPPORT OF RESPONDENT AMY UNKNOWN

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INTEREST OF *AMICUS* AMERICAN PROFESSIONAL SOCIETY ON THE ABUSE OF CHILDREN[1]

The American Professional Society on the Abuse of Children ("APSAC") is the leading national organization supporting professionals who serve children and families affected by child maltreatment and violence, including child sex abuse and child pornography. As a multidisciplinary group of professionals, APSAC achieves its mission in a number of ways, most notably through expert training and educational activities, policy leadership and collaboration, and consultation that emphasizes theoretically sound, evidence-based principles. With more than 26 years of existence and a central role in the development of professional guidelines addressing child abuse and neglect, APSAC is well-qualified to help inform this

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[1] On September 3, 2013, Counsel for Respondent, Amy, filed a consent to the filing of *amicus curiae* briefs, in support of either party or of neither party. On September 6, 2013, Counsel for Respondent, Wright, filed a consent to the filing of *amicus curiae* briefs, in support of either party or of neither party. On September 6, 2013, Counsel for Respondent, United States, filed a consent to the filing of *amicus curiae* briefs, in support of either party or of neither party. On September 6, 2013, Counsel for Petitioner, Paroline, filed a consent to the filing of *amicus curiae* briefs, in support of either party or of neither party. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than the Amici or their counsel made a monetary contribution to this brief's preparation or submission.

Court about the current nature of child pornography and the harm it causes its victims. APSAC is submitting this *amicus* brief in this case to assist the Court in understanding the most recent science documenting the nature and harm done to victims by the market in child pornography and all of its participants.

SUMMARY OF ARGUMENT

To understand how to interpret the Mandatory Restitution for Sexual Exploitation of Children Act, 18 U.S.C. § 2259 (2012), which is the focus of this case, it is necessary to comprehend the nature of the harm inflicted by child pornography. This *amicus* brief documents the following essential facts to aid this Court in understanding the phenomenon of child pornography and its actual effects.

First, from the perspective of the victim whose image appears in child pornography, there is no meaningful difference between the creator, the viewers, or the distributors of pornographic images. They are all participants in a marketplace of child pornography, as this Court acknowledged in *New York v. Ferber*, 458 U.S. 747, 753 (1982), all of whose participants inflict pain and suffering on the victims. Second, even when a child is not sexually assaulted or abused in the creation of the pornography, the memorialization, distribution, and viewing of the pornographic images inflict harm, which is multiplied once the images are uploaded to the Internet. When the

child is sexually assaulted or abused, the distribution of the pornography compounds the victim's psychological injuries. Third, child pornography is not simply an end-product, but also a tool to groom potential victims and, therefore, victims suffer even more knowing that their images are being used to harm other children. Finally, victims of child pornography typically experience lifelong negative and exacerbated effects.

ARGUMENT

Over thirty years ago, in *New York v. Ferber*, 458 U.S. 747 (1982), this Court addressed the following question: "To prevent the abuse of children who are made to engage in sexual conduct for commercial purposes, could the New York State Legislature, consistent with the First Amendment, prohibit the dissemination of material which shows children engaged in sexual conduct, regardless of whether such material is obscene?" *Id.* at 753. The Court's answer was an unequivocal, "Yes." Most important for purposes of this *amicus* brief, the decision turned on the facts of child pornography known at the time, with the majority explaining the need to stop pornography as follows:

> The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children in at least two ways. First, the materials produced are a permanent record of the children's participation and the harm to

> the child is exacerbated by their circulation. **Second, the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled.** Indeed, there is no serious contention that the legislature was unjustified in believing that it is difficult, if not impossible, to halt the exploitation of children by pursuing only those who produce the photographs and movies. While the production of pornographic materials is a low profile, clandestine industry, the need to market the resulting products requires a visible apparatus of distribution. The most expeditious, if not the only practical, method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product. *Id.* at 759-60 (emphasis added; footnotes omitted).

The statute at issue in this case, the Mandatory Restitution for Sexual Exploitation of Children Act, 18 U.S.C. § 2259 (2012) ("Mandatory Restitution Act"), was enacted, in part, to fulfill the goal of drying up the market for this material by imposing severe penalties on those selling, viewing, transmitting, and distributing the material. Mandatory Restitution Act, 18 U.S.C. § 2251 (2012).

Since *Ferber* was decided decades ago, technology has dramatically progressed to the benefit of the pornography market and to the detriment of child sex

abuse victims, as Amy's experience illustrates so well. The science regarding the impact of child sex abuse also has progressed. The purpose of this brief is to provide, on behalf of the leading professional association dedicated to the issue of child abuse, the best scientific understanding today of how the marketplace in child pornography and child pornography itself harms its victims.

It is not only that a child is sexually assaulted or abused as part of its production that makes child pornography so damaging, but also the fact that detailed and graphic images of the child's sexual assault or abuse are made available to millions across the globe. Respondent's Br. at 5. Once those images are released, it is impossible to recapture them. Each person who views the images inflicts fresh damage to the victim. Thus, as this Court first noted in *Ferber*, and as technology has reinforced, it is the marketplace of exchange in these images that is the social evil, and every participant in the market, whether producer, distributor, possessor, or viewer, inflicts serious damage on the subject of the images, whether or not the child is sexually assaulted or abused as part of the creation of the images.

The harm is multiplied by the very size of the global marketplace. As this Court noted in *Ferber*, it is necessary to destroy the market in order to protect children from child sex abuse. This is an extraordinary challenge, because of the global character of the market, which has far surpassed the era of still photographs and films. Now, the Web is the marketplace,

which means every corner of the world can participate. While there is some progress in terms of policing child pornography in the western world, "large areas of the world make virtually no pretense at combating underage sex or child pornography." Philip Jenkins, Beyond Tolerance: Child Pornography on the Internet 195 (2001).

APSAC recently devised a statement on the properly understood relationship between child pornography and the protection of children. American Professional Society on the Abuse of Children, APSAC Statement on the Harm to Child Pornography Victims (Oct. 18, 2013), *available at* http://www.apsac.org/assets/documents/apsac%20statement%20on%20harm%20to%20child%20pornography%20victims%2010.29.13.pdf. This brief tracks the statement and provides further elaboration to assist this Court in understanding the state of the science on child sex abuse, child pornography, and their effects on the child subjects of pornography.

I. For the Victim, the Sexual Abuse, Its Memorialization, Distribution, and Viewing Are Psychologically Intertwined with and Compound the Impact of the Abuse

The memorialization, distribution, and viewing of child pornography add on to the harm already done as part of the child sex abuse and assault that are often the subject of the pornography. As the Department of Justice has explained:

> . . . knowing that all copies of child pornography images can never be retrieved compounds the victimization. The shame suffered by the children is intensified by the fact that the sexual abuse was captured in images easily available for others to see and revictimizes the children by using those images for sexual gratification. Unlike children who suffer from abuse without the production of images of that abuse, these children struggle to find closure and may be more prone to feelings of helplessness and lack of control, given that the images cannot be retrieved and are available for others to see in perpetuity. They experience anxiety as a result of the perpetual fear of humiliation that they will be recognized from the images.

U.S. DEP'T OF JUSTICE: THE NATIONAL STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION: A REPORT TO CONGRESS 9 (Aug. 2010).

Even when a child is not sexually assaulted or abused to make the images, once he or she learns of the images and their distribution, the pornography is experienced as "abusive and harmful." RICHARD WORTLEY & STEPHEN SMALLBONE, INTERNET CHILD PORNOGRAPHY: CAUSES, INVESTIGATION, AND PREVENTION 77 (Graeme R. Newman, ed. 2012). They typically feel shame, embarrassment, anxiety regarding who will view the images, a lack of control over their images, and concern that they may meet someone who has viewed the images. *Id.* The victims "developed a general sense of 'unsafeness [sic], feeling

sexualized, and feeling victimized' because they did not know who may now be viewing their images and because they understood that some may use the images for sexual purposes . . . [I]magining how a stranger may use their image for sexual gratification is likely to be deeply disturbing." *Id.* at 77-78.

The Internet establishes easy, widespread, and worldwide access to sexual images; therefore, victims may never be certain of viewers' identities. *Id.* Many of these victims thus fear that not only stranger-viewers will subsequently recognize them, but also those viewers who know the victims. *Id.* As a result, there are laws in many jurisdictions that ban media identification of sexual abuse victims. *Id.* These laws recognize that the mere knowledge that a child was sexually abused is inherently harmful. *Id. See also* Chris Atkinson & David Newton, *Online Behaviours of Adolescents: Victims, Perpetrators and Web 2.0*, 16:1 JOURNAL OF SEXUAL AGGRESSION 107, 109 (2010).

The effects are often long-term. Respondent's Br. at 5-6. For example, not only is the original victimization damaging, but ongoing fears throughout a victim's life can exist. "One account given . . . by a victim of abuse images talked of feeling fearful every time the mail arrived, overwhelmed with anxiety that the photographs would be in the post and that her mother would see them." ETHEL QUAYLE ET AL., CHILD PORNOGRAPHY AND SEXUAL EXPLOITATION OF CHILDREN ONLINE 49 (2008).

II. Pornography Is Not Only an End-Product, But Also a Common Element of Grooming

It is common for pedophiles to use pornography to groom their next victims. ETHEL QUAYLE ET AL., CHILD PORNOGRAPHY AND SEXUAL EXPLOITATION OF CHILDREN ONLINE 24-25, 48 (2008); Chris Atkinson & David Newton, *Online Behaviours of Adolescents: Victims, Perpetrators and Web 2.0*, 16:1 JOURNAL OF SEXUAL AGGRESSION 107, 109 (2010). As the Department of Justice has documented:

> Grooming usually involves normalizing sexualized behavior in the offender-child relationship by introducing increasingly intimate physical contact by the offender toward the victim, very gradually sexualizing the contact, and sometimes using child pornography to break down the child's barriers. This gradual process and the relationship of trust and authority that the offender usually holds over the child, along with the child's immaturity and subservience, serves to break down the child's resistance. These children have a difficult time understanding what is happening to them and why and have very little control over their circumstances.

U.S. DEP'T OF JUSTICE: THE NATIONAL STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION: A REPORT TO CONGRESS 21 (Aug. 2010); *see also id.* at 31 ("predators gradually introduce child pornography into their seduction methodology. As instructions for desired behaviors, children are shown suggestive images, nudity is introduced, and then actual sexual

abuse is carried out. Gradually the idea of sex between adults and children is normalized.") (internal citation omitted).[2]

III. Child Sex Victims Typically Experience Long-Term Harm and Need Lifelong Care

Child pornography often involves contact sexual abuse. There is empirical data that indicates an association between sexual abuse victimization and grave short and long-term outcomes. RICHARD WORTLEY & STEPHEN SMALLBONE, INTERNET CHILD PORNOGRAPHY 72 (2012) (internal citations omitted). In comparison with those who were not sexually abused, victims were found to experience greater "anxiety and depression, somatic complaints, social withdrawal, anger, and aggressive and sexual behavior problems." *Id.* Hundreds of other studies have established that child sex victims are at higher risk for and often suffer from health problems such as depression, alcoholism, illicit drug use, unintended pregnancies, and sexually transmitted diseases. CENTERS FOR DISEASE CONTROL AND PREVENTION, ADVERSE CHILDHOOD EXPERIENCES (ACE) Study: Major Findings (1997)

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[2] In addition, "the child may often consider images that seem very normal, portraying the child with clothes on but taken by the abuser, as equally or even more disturbing, since these images will form part of the entire abusive process and possibly remind the child of how the perpetrator has violated and built trust and rapport with the child." ETHEL QUAYLE ET AL., CHILD PORNOGRAPHY AND SEXUAL EXPLOITATION OF CHILDREN ONLINE 49 (2008).

available at http://www.cdc.gov/ace/findings.htm (last updated Jan. 18, 2013). For example, a recent study found that the severity of the child abuse often correlates with the severity of the subsequent alcohol abuse. *See* Joseph Nowinski, Ph.D., *Childhood Trauma and Adult Alcohol Abuse: Shedding Light on the Connection*, THE HUFFINGTON POST (July 22, 2013, 10:01 AM), http://www.huffingtonpost.com/joseph-nowinski-phd/alcohol-abuse_b_3595743.html.

Furthermore, these victims also experienced greater levels of anxiety, depression, and anger, and were more likely to act "impulsively" as a response to these emotions. *Id.* This impulsiveness could take the form of abusing alcohol "as a means of coping with or anesthetizing" those feelings. *Id.* Additionally, another study found a "direct neural mechanism, via alteration of the brain's fear circuitry . . . [where] maltreatment [led] to anxiety and depressive symptoms by late adolescence." Ryan J. Herringa, et al., *Childhood maltreatment is associated with altered fear circuitry and increased internalizing symptoms by late adolescence*, PNAS EARLY EDITION 1, 6 (Oct. 2013), *available at* http://www.pnas.org/content/early/2013/10/30/1310766110.full.pdf+html. In addition, "[a]mong the more troubling long-term outcomes of sexual abuse, particularly for female victims, is an increased risk of further sexual victimization later in life – often in apparently unrelated circumstances . . . In one study, women who had experienced sexual abuse as a child were twice as likely as previously nonvictimized women to be raped." WORTLEY & SMALLBONE at 73.

IV. Child Pornography Victims Experience Exacerbated Negative Effects

A subject of child pornography, whether sexually abused or not in the process, can suffer serious negative effects. Respondent's Br. at 5-6. As discussed above, after being abused, child victims "may feel grief, guilt and fear." ETHEL QUAYLE ET AL., CHILD PORNOGRAPHY AND SEXUAL EXPLOITATION OF CHILDREN ONLINE 44 (2008) (internal citations omitted). As a result, the subject's behavior may reflect an "inability to trust, cognitive confusion, lack of mastery and control, repressed anger and hostility, blurred boundaries and role confusion, pseudo-maturity and failure to complete development tasks, depression and poor social skills." *Id.* These negative effects, however, are not limited to situations in which a child was sexually assaulted or abused. Even in "non abusive" situations, when a child's image appears in pornography and learns about the images, the subject will likely suffer from shame, embarrassment, anxiety, and even a feeling that they have an overall loss of control. RICHARD WORTLEY & STEPHEN SMALLBONE, INTERNET CHILD PORNOGRAPHY 77 (2012). *See also* Respondent's Br. at 6. The harm of child pornography extends beyond the particular subject as the behavioral effects of the abuse not only affect the child, but also further complicate problems in the victim's home. WORTLEY & SMALLBONE at 77.

The pornography's depiction of the child being sexually assaulted or abused (whether or not the child was physically assaulted or abused as part of

the production) creates an ongoing fear that is virtually impossible to quell, because the images cannot be controlled. Each time the image is viewed is experienced as a fresh assault by the victim. Respondent's Br. at 6. Thus, child pornography victims typically feel helpless to protect themselves from the harm arising from the distribution and viewing of the images. Upon learning that their images have been disseminated over the Internet and viewed by others, these victims feel "impotent because they will have had no control over the disclosure process – they have not been able to choose when to disclose, what to disclose, how to disclose and to whom they want to disclose." *Id.* at 51. Because victims cannot identify exactly how many and who these viewers may be, they develop a "general feeling of unsafeness [sic] and feeling sexualized." Marcella Mary Leonard, *The Impact of Being a Victim of Internet Offending*, 16:2 JOURNAL OF SEXUAL AGGRESSION 249, 252-53 (2010). The knowledge that strangers will view these images and "convince themselves that the victim is either smiling at them or that they are enjoying the sexual act" further multiplies the victimization. *Id.* Furthermore, the "thoughts of unknown individuals gaining and performing sexual gratification" to the victims' images causes these victims to undergo re-victimization. *Id.* For the child, the issue is still in present tense, and it may be impossible for them to identify a point in time at which their abuse ended. *See* Leonard at 253; WORTLEY & SMALLBONE at 78-79. This is particularly problematic from a recovery standpoint, as it prevents the victim from knowing

that the abuse is a thing of the past. Often times, this can cause a victim to regress to a point of "sickening anticipation," which is the psychotherapeutic term used to describe "the sick feeling in the pit of their stomachs that victims have to live with when their trauma is happening." *See* WORTLEY & SMALLBONE at 78-79; Leonard at 254.

Not knowing who may view, or who has viewed the images of them magnifies the victims' developed sense of unsafeness. WORTLEY & SMALLBONE at 77-78. Unfortunately, as children mature, they will be more likely to understand that adults are using such images for sexual gratification, thereby compounding their victimization. *Id.* Understanding that the pictures are still in use for sexual gratification makes it almost impossible for the victim to fully recover and, therefore, creates the new need for ongoing therapy and care over the course of their lives, particularly at times of stress. Consequently, counselors for Internet victims often fear that younger children will eventually develop a "new experience of loss of control, powerlessness, helplessness, shame and fear." *Id.*

As victims begin to "grasp permanence, they [are] burdened even further, and [feel] a loss of control, powerlessness, helplessness, shame and fear," which further makes it difficult for them to obtain closure. Julia von Weiler, et al., *Care of Treatment of Child Victims of Child Pornographic Exploitation in Germany*, 16:2 JOURNAL OF SEXUAL AGGRESSION 211, 218 (2010). Unfortunately, the worldwide grasp of the Internet further memorializes the child's abuse. While a

child's natural environment may already be a host of anxiety, their fear that strangers will view the images extends not only to people that they see regularly, but also to those in even the most distant locations, indeed, anyone with whom they come into contact. Consequently, the child is "unable to think of the world as a safe place, because no matter where they are they could meet someone who is looking at pictures of them." Leonard at 253. In fact, the mere mention of the Internet can trigger a victim's recollection of the abuse. *Id.* In a technological age, it is impossible for one to not be constantly accessing, or reminded of, the World Wide Web. What may seem like a mere statement to one person, could act as a trigger of re-victimization for a child of abuse. Thus, not only the creation, but also the distribution, sharing, and viewing of child pornography, causes serious harm to the victims. Respondent's Br. at 5-6. Sadly, victims may live lives of "sickening anticipation." Leonard at 254.

CONCLUSION

Those like the Respondents in this case have suffered serious harm that is distinct from and additional to the harm of initial child sex abuse that leads to child pornography. It is APSAC's hope that this brief has assisted this Court with understanding the legitimate need of pornography subjects for restitution from pornography market participants. For child pornography victims, a distinction between creators

and distributors and viewers is a false distinction. They are all part of the marketplace that endangers children generally and can continue to harm victims throughout their adulthood.

Respectfully submitted,

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AMICUS CURIAE BRIEF

SUPREME COURT, U.S.
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In The Supreme Court of the United States

DOYLE RANDALL PAROLINE,

Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF AMICI CURIAE THE DOMESTIC VIOLENCE LEGAL EMPOWERMENT AND APPEALS PROJECT, LEGAL MOMENTUM, THE NATIONAL COALITION AGAINST DOMESTIC VIOLENCE, PROFESSOR MARGARET DREW, PROFESSOR LEIGH GOODMARK, AND PROFESSOR MARGARET GARVIN SUPPORTING RESPONDENT AMY UNKNOWN

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QUESTION PRESENTED

What, if any, causal relationship or nexus between the defendant's conduct and the victim's harm or damages must the government or the victim establish in order to recover restitution under 18 U.S.C. § 2259?

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INTEREST OF AMICI CURIAE[1]

Amici include nonprofit organizations as well as law professors committed to preventing and responding to violence against women.

The Domestic Violence Legal Empowerment and Appeals Project (DV LEAP) was founded in 2003 by a leading domestic violence lawyer and scholar. DV LEAP provides a stronger voice for justice by fighting to overturn unjust trial court outcomes, advancing legal protections for victims and their children through expert appellate advocacy, training lawyers, psychologists and judges on best practices, and spearheading domestic violence litigation in the Supreme Court. DV LEAP is committed to ensuring that courts understand the realities of domestic violence and the law when deciding cases with significant implications for domestic violence litigants. DV LEAP has co-authored amicus briefs in numerous state courts and to the United States Supreme Court in *Town of Castle Rock, Colo. v. Gonzalez; Davis v. Washington; Hammon v. Indiana; Giles v. California; United States v. Hayes; Abbott v. Abbott; Florence v. Board of Chosen Freeholders*; *and Robertson v. Watson* (concerning enforcement of protection orders). DV LEAP is a partnership of the George Washington University Law School and

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[1] Letters consenting to the filing of this brief have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than Amici, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

a network of participating law firms. Through DV LEAP's work on custody litigation and protective parent advocacy, it has become deeply involved in child abuse and child protection litigation and work, particularly child sexual abuse. Child pornography distribution is a major contributor to child sexual abuse and therefore DV LEAP supports powerful sanctions for the use of such pornography.

Legal Momentum, the Women's Legal Defense and Education Fund, is the nation's oldest legal advocacy organization for women, www.legalmomentum.org. Legal Momentum advances the rights of all women and girls by using the power of the law and creating innovative public policy. Legal Momentum was one of the leading advocates for passage in 1994 of the landmark Violence Against Women Act, as well as its three subsequent reauthorizations, all of which have sought to redress the historical inadequacy of the justice system's response to domestic and sexual violence. Legal Momentum has a deep interest in ensuring that the judicial system adequately protects the rights of victims of sexual and domestic violence and their children. Legal Momentum has represented survivors of domestic and sexual violence, and developed a wide variety of educational materials for judges, court-related personnel, and others on VAWA-related issues. Thus, any case with direct implications for recovery under 18 U.S.C. § 2264, the portion of VAWA that provides for mandatory restitution upon

the commission of interstate acts of domestic violence, stalking, or violation of a protection order, is of great concern to Legal Momentum.

The National Coalition Against Domestic Violence (NCADV), a nonprofit organization founded in 1978 and incorporated in the state of Oregon is a national nonprofit that provides general information and referrals, technical assistance to domestic violence service providers and serves as the primary representative of over 2,000 local programs, battered women, and their children in the public policy arena. NCADV also provides extensive information and resources to the general public through its website at www.ncadv.org, Facebook, and Twitter accounts.

Professor Margaret Drew has been an advocate for abused women for over thirty years. Professor Drew began her representation of battered women while in private practice in Massachusetts. After twenty five years of private practice Professor Drew transitioned into academia where she continues her advocacy and trains students in the theory and practice of law, with an emphasis on competent representation of battered women. Professor Drew is visiting clinical specialist at Northeastern University School of Law having previously served as Director of Clinics and Experiential Learning at the University of Cincinnati College of Law and Interim Director of the Domestic Violence Clinic at the University of Alabama School of Law. Professor Drew has an interest in seeing that victims of abuse are adequately compensated for the harm done to

them and supports the remedies available under the Violence Against Women Act.

Leigh Goodmark is a Visiting Professor of Law at the University of Maryland School of Law, where she directs the Gender Violence Clinic. Professor Goodmark is the author of numerous articles on domestic violence; her book, *A Troubled Marriage: Domestic Violence and the Legal System* was published by New York University Press in 2012. In that book, Professor Goodmark discusses the problems of economic marginalization of women subjected to abuse and the need for remedies that empower women economically. Professor Goodmark's students in the Gender Violence Clinic regularly litigate domestic violence protective order matters and custody and divorce cases involving intimate partner abuse, and her clients routinely face economic insecurity as a result of their abuse.

Margaret Garvin is a Clinical Professor of Law at Lewis & Clark Law School, where she has directed the Victims' Rights Litigation Clinic for eight years. Attorney Alison Wilkinson works with students researching violence against women issues at the Clinic. Professor Garvin has testified before Congress on victims' rights and has published on the issue of victims' rights. Professor Garvin and Ms. Wilkinson have an interest in protecting all victims' rights to recover full restitution, including the rights of victims of violence against women, and in teaching students how to litigate on behalf of this population.

SUMMARY OF ARGUMENT

In 1994, Congress passed the Violence Against Women Act (VAWA), which represented "an essential step in forging a national consensus that our society will not tolerate violence against women." S. Rep. No. 103-138, at 41 (1993). The Act was "intended to respond both to the underlying attitude that this violence is somehow less serious than other crime and to the resulting failure of our criminal justice system to address such violence." *Id.* at 38.

Among the provisions enacted as part of VAWA are sections 18 U.S.C. § 2261 *et seq.*, which define the intentional crimes of federal domestic violence, stalking, and protective order violations. 18 U.S.C. §§ 2261-2262. VAWA provides for mandatory restitution upon the commission of these crimes. 18 U.S.C. § 2264. "This order of restitution addressed the needs articulated by many victims of these crimes beyond punishment of the perpetrator in order to remain safe and to rebuild their lives." Robin Runge, *The Evolution of a National Response to Violence Against Women*, 24 Hastings Women's L.J. 429, 439 (2013) (commenting on VAWA's mandate that courts issue orders of restitution).

Concurrent with the passage of this legislation, and as part of the same legislative package, Congress passed 18 U.S.C. § 2259, the legislation that is the subject of this proceeding. The restitution provisions of VAWA and those of § 2259 have virtually identical language, and, as such, courts have viewed them

interchangeably. Accordingly, the Court's decision regarding the application of a causal nexus to the specifically enumerated categories of loss in § 2259 will impact interstate domestic violence, stalking, and protection order violation victims seeking to recover restitution under the Violence Against Women Act.

This impact is likely to be immediate and severe. It would undercut the history, purpose, and text of VAWA. More pragmatically, it would directly impact domestic violence victims' ability to obtain their most basic needs in the aftermath of the abuse: the need to find safety and to make the shift from "victim" to "survivor."

ARGUMENT

I. VICTIMS' ABILITY TO RECEIVE NEEDED FINANCIAL SERVICES UNDER THE VIOLENCE AGAINST WOMEN ACT WILL BE IMPACTED BY THE COURT'S INTERPRETATION OF 18 U.S.C. § 2259

Every year, approximately 1.3 million people are victims of domestic violence in the United States.[2]

[2] Partner violence impacts men as well as women. For instance, in 2000, 1,247 women and 440 men were killed by an intimate partner. Callie Marie Rennison, U.S. Dep't of Just., NCJ 197838, *Bureau of Justice Statistics Crime Data Brief: Intimate Partner Violence, 1993-2001*, at 1 (2003), *available at* http://www.bjs.gov/content/pub/pdf/ipv01.pdf. Additionally, 15.4% of same-sex cohabitating men reported being raped, physically

(Continued on following page)

Jennifer Truman *et al.*, U.S. Dep't of Justice, NCJ 243389, *Criminal Victimizations, 2012*, at 2-3 (Oct. 2013), *available at* http://www.bjs.gov/content/pub/pdf/cv12.pdf. In 2007 alone, 1,640 women were killed by their intimate partners. Shannan Catalano *et al.*, U.S. Dep't of Justice, NCJ 228356, *Female Victims of Violence*, at 2 (Sept. 2009), *available at* http://www.bjs.gov/content/pub/pdf/fvv.pdf.

In addition to the immediate, physical harm experienced by victims, this violence "has a profound effect on women's mental health, and frequently extends to other outcomes including quality of life, social and occupational functioning, and physical health." Michael Rodríguez et al., *Intimate Partner Violence and Barriers to Mental Health Care for Ethnically Diverse Populations of Women*, 10 Trauma, Violence, & Abuse 358, 359 (2009) (internal citations omitted). The consequences of the violence "linger on well after the violence has ended[. These consequences may include] posttraumatic stress disorder (PTSD), depression, substance abuse, and other negative mental health and physical health outcomes." Kim M. Anderson *et al.*, *Recovery: Resilience*

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assaulted, and/or stalked by a male partner. Patricia Tjaden & Nancy Thoennes, U.S. Dep't of Just., NCJ 181867, *Extent, Nature, and Consequences of Intimate Partner Violence: Findings from the National Violence Against Women Survey*, at 30 (2000), *available at* https://www.ncjrs.gov/pdffiles1/nij/181867.pdf. While the impact of such violence on men cannot be discounted, this brief focuses on the more prevalent use of violence against women.

and Growth in the Aftermath of Domestic Violence, 18 Violence Against Women 1279, 1279-80 (2012) (internal citations omitted).

Despite the impact of domestic violence, there are numerous practical difficulties to leaving such a situation, including financial reasons. Indeed, for many, financial difficulties are among the most significant impediments to leaving the batterer and finding safety. *See, e.g.*, Adrienne E. Adams *et al.*, *Development of the Scale of Economic Abuse*, 14 Violence Against Women 563, 568 (2008) ("Studies have consistently identified economic dependence as a critical obstacle for many women who are attempting to leave abusive partners."); Deborah A. Widiss, *Domestic Violence and the Workplace: The Explosion of State Legislation and the Need for a Comprehensive Strategy*, 35 Fla. St. U. L. Rev. 669, 672 (2008) ("Economic security is one of the most important factors in whether a victim of domestic violence can separate from an abusive partner."); Shelby A.D. Moore, *Understanding the Connection Between Domestic Violence, Crime, and Poverty: How Welfare Reform May Keep Battered Women from Leaving Abusive Relationships*, 12 Tex. J. Women & L. 451, 475 (2003) ("The greatest obstacle to leaving is the victim's lack of access to money to support herself and her children."); Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. Davis L. Rev. 1009, 1020-21 (2000) ("[I]nadequate resources are a primary reason why women do not attempt to separate.").

Abusers often use economic abuse as part of the control dynamic. Abusers will interfere with the victim's ability to obtain resources, such as by preventing the victim from getting a job, or from maintaining employment. *See, e.g.*, Adams, *supra*, at 565 (discussing ways in which an abuser may interfere with a victim's ability to acquire resources); Richard M. Tolman & Hui-Chen Wang, *Domestic Violence and Women's Employment: Fixed Effects Models of Three Waves of Women's Employment Study Data*, 36 Am. J. of Comm. Psych. 147, 153 (2005) ("[T]he experience of domestic violence alone reduces a woman's annual work hours by 137 [hours]."). Lacking financial security, victims are unable to obtain the services they need to leave the abuser or to survive after they have left. *See, e.g.*, Michelle Fugate *et al.*, *Barriers to Domestic Violence Help Seeking: Implications for Intervention*, 11 Violence Against Women 290, 299 (2005) (stating that external barriers, such as no money, helped make up nearly 20% of women's reasons for not contacting an agency or counselor); Rodríguez et al., *supra*, at 367 ("One of the more apparent barriers to easily accessible mental health care service [for minority victims] is a limit or lack of financial resources."); Nicole Letourneau *et al.*, *Social Support Needs Identified by Mothers Affected by Intimate Partner Violence*, 28 J. Interpers. Violence 2873, 2881 (2013) (discussing lack of financial resources as an impediment to accessing services).

Recognizing the negative impact of such violence and the importance of services in helping victims

survive and leave the batterer, Congress enacted extensive legislation to help prevent and respond to these crimes. *See, e.g.*, Family Violence Prevention and Services Act, 42 U.S.C. § 10401 (assisting states in increasing public awareness about domestic violence, providing shelter and supportive systems, and a national domestic violence hotline, among other initiatives); The Victims of Crime Act, 42 U.S.C. § 10601 (providing funds for services for victims of violence); 42 U.S.C. § 13925 (providing grants for organizations providing services for victims of violence against women).

A critical piece of these legislative efforts is VAWA. One portion of VAWA that was specifically designed to ameliorate the financial impediments and impact of violence against women is 18 U.S.C. § 2664. Section 2264 was enacted along with 18 U.S.C. § 2259, the legislation that is the subject of this proceeding, and 18 U.S.C. § 2248 (collectively, the Mandatory Restitution Statutes), using substantially identical language, and as part of a comprehensive scheme to provide mandatory, full restitution to victims of certain crimes. Because full restitution can allow victims access to needed services, it can be a crucial aspect of their return to safety and their recovery. *See, e.g., United States v. Gordon*, 393 F.3d 1044, 1053 (9th Cir. 2004) (stating that the "primary and overarching goal" of the Mandatory Victims Restitution Act (MVRA) "is to make victims of crime *whole*, to *fully* compensate these victims for their losses and to restore these victims to their original

state of well-being") (citing *United States v. Simmonds*, 235 F.3d 826, 831 (3d Cir. 2000)); Theodore R. Sangalis, Comment, *Elusive Empowerment: Compensating the Sex Trafficked Person under the Trafficking Victims Protection Act*, 80 Fordham L. Rev. 403, 438 (2011) ("[C]ompensation that seeks to make victims whole can be an important first step in their recovery.").

As will be discussed further below, because of the virtually identical language in the Mandatory Restitution Statutes, the legislative history surrounding them, and the tendency of courts to view these statutes interchangeably, this Court's decision regarding the application of a causal nexus to the specifically enumerated categories of loss in § 2259 will have a direct impact on interstate domestic violence, stalking, and protection order violation survivors seeking to recover restitution under § 2264. If this Court interprets § 2259 to have a global proximate cause requirement the Court will have created a nearly insurmountable hurdle for survivors, which will result in those survivors carrying the financial burden of much of their own victimization and, perhaps more importantly, rendering departure from the abuser all the more difficult. This result would be contrary to the plain language of the Violence Against Women Act, public policy, and clear Congressional intent to ensure full financial recovery.

II. READING A PROXIMATE CAUSE REQUIREMENT INTO THE SPECIFICALLY ENUMERATED CATEGORIES OF LOSS IS CONTRARY TO STATUTORY LANGUAGE, CONGRESSIONAL INTENT, AND PUBLIC POLICY

A. Sections 2259 and 2264 are Substantially Identical in Text and Interpretation.

Facially this case concerns the interpretation and application of 18 U.S.C. § 2259. However, that statute cannot be read in a vacuum. Section 2259 was amended as part of the Mandatory Victims Restitution Act of 1996 (MVRA), which amended the non-mandatory restitution statute 18 U.S.C. § 3663, added the mandatory restitution statute 18 U.S.C. § 3663A, and amended the three then-existing mandatory restitution statutes. These included not only § 2259, but also § 2264 – a portion of the Violence Against Women Act requiring mandatory restitution for victims of violence against women – and § 2248, requiring mandatory restitution for victims of child sexual abuse.[3] In keeping with the intent that these

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[3] This brief focuses on the effect this Court's decision will have on victims of the intentional crimes of interstate stalking, domestic violence, and protection order violations, whose right to mandatory restitution is set forth in § 2264. However, for the same reasons set forth in this brief, victims of the intentional crime of child sexual abuse, whose right to restitution is protected under § 2248, could also see their financial rights eroded by the decision of this Court. Trafficking victims, too, will be

(Continued on following page)

statutes be read as part of a cohesive whole, the Mandatory Restitution Statutes were revised to read substantially identically. *See* S. Rep. No. 104-179 at 19 (1995) (stating that the Mandatory Restitution Statutes were specifically reevaluated and amended in order "to conform the mandatory and permissive restitution provisions in current law to the provisions of this act").

Indeed, the only substantive difference is found in comparing §§ 2248(b)(3)(E) and 2264(b)(3)(E) to § 2259(b)(3)(E). Sections 2248(b)(3)(E) and 2264(b)(3)(E) each require that the "full amount of the victim's losses" include "attorneys' fees, plus any costs incurred in obtaining a civil protection order," whereas § 2259(b)(3)(E) has a more general requirement that the "full amount of victim's losses" include "attorneys' fees, as well as other costs incurred."

Given the text of the statutes and the legislative history surrounding them, it is unsurprising that courts generally analyze the statutes interchangeably. *See, e.g.*, *United States v. Kearney*, 672 F.3d 81, 97 n.13 (1st Cir. 2012) (discussing the overlaps in the

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impacted by this Court's decision. The Trafficking Victims Protection Act, 18 U.S.C. § 1593(b)(3), specifically incorporates the definition of the "full amount of the victim's losses" as set forth in § 2259. 18 U.S.C. § 1593(b)(3) ("As used in this subsection, the term 'full amount of the victim's losses' has the same meaning as provided in section 2259(b)(3). . . ."). A more thorough discussion of the impact on these populations of victims is beyond the scope of this brief.

Mandatory Restitution Statutes); *United States v. Julian*, 242 F.3d 1245, 1247 (10th Cir. 2001) (discussing the duplication in these three statutes and the broad restitution intended under them); *United States v. Hardy*, 707 F. Supp. 2d 597, 609 (W.D. Pa. 2010) (discussing the "cohesive scheme" enacted by the Mandatory Restitution Statutes). Accordingly, any decision from the Court regarding the meaning of the causal requirement in § 2259 is likely to have a direct and immediate impact on courts' interpretation of § 2264 of the Violence Against Women Act as well.

B. Congress Intentionally Used Broad Language, Indicating An Intent to Forego a Proximate Cause Requirement as to the Specifically Enumerated Categories of Loss.

1. The Term "Victim" in §§ 2259 and 2264 is Intentionally Broad.

As with § 2259, § 2264 defines "victim" as "the individual harmed as a result of a commission of a crime under this chapter. . . ." *Id.* at § 2264(c). Conspicuously missing from either definition of "victim" is a proximate cause requirement. Notably, in 18 U.S.C. §§ 3663 and 3663A, which, as discussed above, were adopted concurrently with § 2264 and as part of the same scheme, "victim" is defined more narrowly as "a person *directly and proximately harmed* as a result of the commission of an offense for which restitution may be ordered. . . ." 18 U.S.C. §§ 3663(a)(2); 3663A(a)(2) (emphasis added). "[I]t is

generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." *Chicago v. Envtl. Defense Fund*, 511 U.S. 328, 338 (1994) (internal quotations omitted). Accordingly, Congress knew how to, and could have, included a proximate cause requirement in the definition of "victim" if it so chose; it did not do so in § 2264, which reflects a clear intent not to burden survivors with such causation requirements.

Congress's intent to ensure broad inclusion in the definition of "victim" is made even clearer by earlier versions of the definition of "victim" in § 2264, which did contain proximate cause language. *See* S. 2754, 101st Cong. § 2263(c) (as introduced in Senate); S. 2754, 101st Cong. § 2264(e) (as reported in Senate) (defining "victim" as "any person who has suffered *direct* physical, emotional, or pecuniary harm as a result of a commission of a crime under this chapter. . . .") (emphasis added). Thus, Congress clearly knew how to integrate proximate cause if it intended; the absence of such language evinces Congress's intent to keep the definition of victim broader as to victims of the categories of crime covered by the Mandatory Restitution Statutes.

2. The History of § 2264 Reveals an Intent to Broaden the Scope of Restitution, Not Narrow It.

Once the individual harmed meets the definition of "victim," § 2264 mandates broad recovery for losses. Section 2264 states that courts "shall direct the defendant to pay the victim . . . the *full amount* of the victim's losses. . . ." 18 U.S.C. § 2264(b)(1) (emphasis added). Included among the items for which the victim is entitled to "full" restitution are medical services, physical therapy, temporary housing, transportation, and child care expenses, lost income, and attorneys' fees plus any costs incurred in obtaining a civil protection order. 18 U.S.C. § 2264(b)(3)(A)-(E). There is no causal language appended to any of these categories of expenses. Notably, Congress did include a sixth category of loss for which there is a proximate cause requirement. *See* 18 U.S.C. § 2264(b)(3)(F) (stating that the full amount of the victim's losses can also include "any other losses suffered by the victim *as a proximate result of the offense*") (emphasis added).

In addition to the language being plain, the history of § 2264 provides further strong support that this proximate cause requirement attaches only to the final category of loss. The 1990 versions of the bill introduced and reported in the Senate affixed the "proximate result" language not only to the catch-all provision of the bill, but to another category of loss as well: that for "any income lost by the victim." S. 2754, 101st Cong. § 2263(a)(2)(C) (as introduced in Senate);

S. 2754, 101st Cong. § 2264(a)(2)(C) (as reported in Senate) (stating that the "full amount of the victim's losses" includes "any income lost by the victim as a proximate result of the offense"). The other categories of loss contained no such language. *Id.*

Under the series qualifier principle of statutory construction, as set forth in *Porto Rico Railway*, "[w]hen several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." *Porto Rico Ry. Light & Power Co. v. Mor*, 253 U.S. 345, 348 (1920). To read the final nexus requirement in the 1990 version of the Act as "applicable as much to the first and other words as to the last," such that it would apply to the lost income requirement, would be to read a redundancy into the statute. Congress is presumed not to create redundancies in statutes. *See Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 837 (1988) ("[W]e are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law."). Thus it is clear that in the 1990 version of the Act, Congress did not intend a nexus requirement as to the categories of loss to which no explicit nexus requirement applied: medical services; physical and occupational therapy and rehabilitation; attorneys' fees; and costs incurred in obtaining a civil protection order. S. 2754, 101st Cong. § 2264(a)(2) (as reported in Senate).

In 1991, Congress deleted the proximate cause requirement from the lost income provision, which carried through to subsequent versions of the Act. S. 15, 102nd Cong. § 2264(b)(2)(C) (as introduced in Senate). By so doing, Congress furthered its aim of allowing survivors of interstate domestic violence, stalking, and protection order violations to obtain "full" restitution. It strains credulity to argue that by deleting the proximate cause requirement from the lost income category, Congress actually intended to keep a proximate cause requirement. The strain deepens when arguing that by broadening the language of the statute, Congress actually intended to narrow the statute by affirmatively adding a proximate causation requirement to every other category of loss enumerated – categories to which Congress certainly did not intend to extend a nexus requirement in the 1990 version of the Act. The deletion of the proximate cause requirement from the lost income subcategory should be taken for what it is – a decision by Congress to contain the nexus requirement in § 2264(b)(1) to the final, catch-all provision. *See Russello v. United States*, 464 U.S. 16, 23-24 (1983) ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended.").

3. Adding a Nexus Requirement into the Enumerated Categories of Loss in § 2264 Would Undermine the Violence Against Women Act and Harm Survivors.

Case law interpreting the proximate cause requirement in § 2264 is limited. In one of the few cases to directly address the proximate cause portion of § 2264, the Second Circuit grappled with defendant's argument that he should not be required to pay restitution for one of the specific categories of loss enumerated in § 2264 – the costs incurred in obtaining a civil protection order – because "[t]he losses incurred in acquiring a protection order clearly predate the occurrence of the specific conduct that [defendant] argues underlies the offense of conviction . . . namely, the crossing of state lines . . . to violate the protection orders." *United States v. Hayes*, 135 F.3d 133, 137 (2d Cir. 1998). Although not clear from the opinion, the defendant appeared to be arguing that proximate cause requires both a causal nexus between the offense and the harm, and that the harm stem from the offense of conviction. This definition is consistent with many jurisdictions' interpretation of proximate cause in the context of § 2259. *See, e.g.*, *United States v. Aumais*, 656 F.3d 147, 153 (2d Cir. 2011) (stating that § 2259 requires that "a victim's losses . . . be proximately caused by the defendant's offense"); *United States v. Laney*, 189 F.3d 954, 965 (9th Cir. 1999) (stating that § 2259 requires a "causal connection between the offense of conviction and the

victim's harm"); *United States v. Woods*, 689 F. Supp. 2d 1102, 1108 (N.D. Iowa 2010) (citing with approval § 2259 case law requiring a causal connection between the offense of conviction and the victim's harm); *United States v. Berk*, 666 F. Supp. 2d 182, 187-88 (D. Me. 2009) ("[N]early every court to have [interpreted § 2259] has found that it requires the victim's loss to have been proximately caused by the offense of conviction") (collecting cases); *United States v. Church*, 701 F. Supp. 2d 814, 830 (W.D. Va. 2010) ("[T]he Court holds that § 2259 requires that a victim's losses be proximately caused by the offense for which the Defendant was convicted to be recoverable in restitution.").

In finding that defendant was required to pay restitution for the losses incurred in acquiring the protection order, the court found that Congress read into categories A through E a *de facto* finding of proximate cause, stating:

> Reading Section 2264(b)(3)(E) together with Section 2264(b)(3)(F), attorneys' fees and costs of obtaining a protection order *are among the "losses suffered by the victim as a proximate result of the offense."* That those costs, which date back to the acquisition of the protection orders, *were considered by Congress to be among the losses that are proximately caused by the offense* strongly suggests that Congress did not intend the other costs enumerated as among those that proximately result from the offense, including costs for child care, housing, and lost

> income, to be limited to amounts incurred only after the interstate activity.

Hayes, 135 F.3d at 138 (emphases added and citations omitted).[4]

By finding that Congress read a proximate result into certain categories of expenses, the court determined that recovery of the enumerated expenses is automatic once it has been ascertained that the

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[4] The interpretation of *Hayes* found in dicta in *United States v. Fast*, 709 F.3d 712, 721 (8th Cir. 2013) is strained and out of context. There the court stated that the *Hayes* court merely noted that Congress "authorize[d]" restitution for the categories of loss enumerated in subsections A through E, but that causation still must be proved in each case. *Id.* (citing *Hayes*, 135 F.3d at 138). This interpretation is flawed. First, the full context of the *Hayes* court's interpretation of § 2264 is that "[a] straightforward reading of Section 2264 . . . *authorizes* restitution for more than merely those losses occurring after a defendant has crossed state lines to violate a protection order." *Hayes*, 135 F.3d at 138 (emphasis added). The use of the word "authorizes" here is in keeping with the court's larger holding: namely, that it is erroneous to find that Congress intended to limit restitution to costs incurred after the offense of conviction. By using the word "authorizes," the *Hayes* court recognized that Congress intended to allow restitution for costs occurring before the offense of conviction. Additionally, the *Fast* interpretation would require that a superfluous requirement of causation be read into the enumerated costs. The *Fast* court acknowledges that the *Hayes* court found that the enumerated costs are "among the losses that are proximately caused by the offense." *Fast*, 709 F.3d at 721 (citing *Hayes*, 135 F.3d at 138). However, it went on to conclude that because recovery for these proximate losses are only "authorized" by Congress, causation must still be proven. Because Congress has already stated that there is causation, the further causation requirement is duplicative.

survivor meets the statutory definition of "victim." In other words, Congress determined that expenses such as for relocating and mental health care are so common and so frequently stem from stalking and domestic violence that the victim need not make any additional causal claim of proof. While Amici argue the better articulation is that Congress intended there to be no proximate cause requirement at all as to categories A through E, rather than that proximate result is presumed as to those categories of expense, the end result is the same: neither the victim nor the government need prove proximate cause in order for a victim to be able to recover for losses sustained in the categories enumerated in subsections A through E.

Although *Hayes* focused on the costs incurred in obtaining a protective order, every other loss could – and often would – occur prior to the violation of the offense of conviction. For instance, in a typical case of interstate domestic violence, the survivor will move across state lines to escape her abuser. Associated with this move will be temporary housing and necessary transportation expenses, as specifically provided for in 18 U.S.C. § 2264(b)(3)(C). Only *after* this move across state lines could defendant be convicted of interstate domestic violence – if the domestic violence act occurs within the state, there is no federal offense.

As another example, if a proximate cause requirement were read into the enumerated categories of loss, victims may be unable to recover fully expenses for counseling. Beyond even the temporal issue of when the victim began counseling, if § 2264 were read to require that restitution for counseling be

proximately caused by the offense of conviction, the victim would have to parse the portion of restitution expenses that followed from the violence related to the crossing of state lines from the original abuse requiring her to flee. Such a limited reading of the statute would undermine victims' access to counseling, which may be crucial to recovery. Kim M. Anderson *et al.*, *supra*, at 1292-93 (finding that the vast majority of women studied who sought mental health counseling found it to be helpful in processing their trauma and managing their PTSD symptoms); Judy L. Postmus, *Women's Experiences of Violence and Seeking Help*, 15 Violence Against Women 852, 852 (2009) ("[M]ost researchers agree that disclosing abuse and seeking help from informal and formal support networks will lessen the long-term impact of abuse.").

Such a limited reading of the Violence Against Women Act is in conflict with the clear language of the statute and the intent of Congress and therefore cannot stand. *See United States v. Menasche*, 348 U.S. 528, 538-39 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute.'") (quoting *Inhabitants of Montclair Tp. v. Ramsdell*, 107 U.S. 147, 152 (1883)); *New York State Dept. of Social Services v. Dublino*, 413 U.S. 405, 419-20 (1973) ("We cannot interpret federal statutes to negate their own stated purposes.").

CONCLUSION

Because it is contrary to the language of the statute and Congressional intent to read a proximate cause requirement into § 2264, the same analysis must by necessity apply to § 2259. *See generally* Section II.A, *infra*. As a corollary, if the Court were to read a proximate cause requirement into §2259, courts would likely interpret § 2264 as requiring a proximate cause requirement as well, thus severely limiting victims' ability to recover the full restitution intended by Congress under the mandatory restitution provisions of the Violence Against Women Act. Such a limited reading would undercut the history, purpose, and language of VAWA, and the ability of victims of stalking, domestic violence, and protective order violations to find safety and begin rebuilding their lives.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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DOYLE RANDALL PAROLINE,

Petitioner,

vs.

AMY UNKNOWN and UNITED STATES,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF *AMICUS CURIAE* OF THE DUTCH NATIONAL RAPPORTEUR ON TRAFFICKING IN HUMAN BEINGS AND SEXUAL VIOLENCE AGAINST CHILDREN IN SUPPORT OF RESPONDENT AMY UNKNOWN

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U.S. Dep't of State, *Initial Report of the United States of America to the U.N. Committee on the Rights of the Child Concerning the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* (Sept. 14, 2007) 6, 8, 18

U.S. Dep't of State, *Periodic Report of the United States of America and U.S. Response to Recommendations in Committee Concluding Observations of June 25, 2008* (Jan. 22, 2010) 5, 8, 9

U.S. Sentencing Comm'n, *Report to Congress: Federal Child Pornography Offenses* (Dec. 2012) 23, 27, 28, 29

United Nations Children's Fund, *The Yokohama Global Commitment* (2001) 18

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Julia von Weiler et al., *Care and Treatment of Child Victims of Child Pornographic Exploitation (CPE) in Germany*, 16 J. of Sexual Aggression 211 (2010) 28, 29, 30

BRIEF *AMICUS CURIAE* OF THE DUTCH NATIONAL RAPPORTEUR ON TRAFFICKING IN HUMAN BEINGS AND SEXUAL VIOLENCE AGAINST CHILDREN IN SUPPORT OF RESPONDENT AMY UNKNOWN

INTEREST OF THE *AMICUS CURIAE*[1]

The Dutch National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children ("National Rapporteur") is an independent official organ of the Netherlands.[2] The National Rapporteur's

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[1] On September 3, 2013, Counsel for Respondent Amy Unknown, filed a consent to the filing of *amicus curiae* briefs in support of either or neither party. On September 6, 2013, Counsel for Respondent Wright, Counsel for Respondent United States, and Counsel for Petitioner Paroline filed consents to the filing of *amicus curiae* briefs in support of either or neither party. No counsel for a party authored this brief wholly or partially, nor made a monetary contribution intended to fund this brief's preparation or submission. No person other than *Amicus* and her counsel made a monetary contribution to this brief's preparation or submission.

[2] The Dutch government created the National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children in response to the Hague Declaration of 1997, adopted at a European Union ministerial conference on combating human sex trafficking. The National Rapporteur conducts research on human trafficking and the sexual abuse of children to fulfill the Dutch government's international treaty obligations. *See* Directive 2011/36/EU, of the European Parliament and the Council of 5 April 2011 on Preventing and Combating Trafficking in Human Beings and Protecting Its Victims, and Replacing Council Framework Decision 2002/629/JHA, art. 19, 2011 O.J. (L 101) 1; Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse art. 10(2)(b), *opened for signature* Oct. 25, 2007, C.E.T.S. No. 201

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primary purpose is to report on the nature and extent of human trafficking and sexual violence against children in the Netherlands. Both globalization and the advent of the Internet have significantly enhanced the transnational nature of these crimes; with the ease of exchanging abusive material over the Internet, this is particularly evident in the case of child pornography.[3] The rapid globalization of the child pornography market has compelled nations to collaborate in order to combat the challenges of twenty-first century child pornography. It is in the spirit of both the United States' and the Netherlands'

("Lanzarote Convention"); Directive 2011/92/EU, of the European Parliament and of the Council of 13 December 2011 on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography, and Replacing Council Framework Decision 2004/68/JHA, 2011 O.J. (L 335) 1. As of November 15, 2013, the National Rapporteur is organized under a recently enacted Dutch law that replaces a ministerial decree. The law maintains the National Rapporteur as an independent official organ of the Netherlands.

[3] The phrase "child pornography" is used in this brief interchangeably with "child sexual abuse images." Use of the latter phrase emerged to distinguish it from simulated child pornography where no actual child is used in the production of the images. Thus, "child sexual abuse images" refers specifically to child pornography in which an actual child is abused to produce the images. This is the child pornography that the National Rapporteur is referring to in this brief since a child is harmed in the production of the child sexual abuse images and then continues to be harmed when the images are distributed and consumed. The term "images" is expansive and may include digital imagery, photographs, sketches, cartoons, movies, sound recordings, paintings, or any other depiction of the sexual abuse of a child regardless of media.

history of international cooperation with regard to child pornography, its perpetrators, and, most importantly, its victims, that the National Rapporteur respectfully submits this brief in support of Respondent, Amy Unknown.[4]

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[4] The Special Representative of the United Nations Secretary-General on Violence against Children, Marta Santos Pais, asked the National Rapporteur to include the following statement from Ms. Santos Pais in this brief:

> The Special Representative of the Secretary-General on Violence against Children (SRSG) has identified the opportunities and risks associated with children's access to and use of new information and communications technologies as a priority for her mandate. This work is guided by international human rights standards, including the Convention on the Rights of the Child and its Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography which recognize children's right to protection from sexual abuse through representation or images in pornographic performances or materials. Child pornography is a serious form of violence against children, including during its production and dissemination, and when it is subsequently viewed by potentially thousands of child sex abusers. At the dawn of the 1990s the exchange of information through cyberspace was just beginning. As widespread online access became commonplace, child pornography made its way into the global and connected world on the screens of personal computers, through mobile phones and social media. Information is available more easily and may be spread more quickly, potentially reaching out to millions in a fraction of a second and remaining accessible for a lifetime, with a serious impact on countless children. It is imperative that child victims of this form of sexual abuse are given the right to restitution

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SUMMARY OF THE ARGUMENT

The United States' treaty obligations compel reading 18 U.S.C. §2259 without imposing a proximate cause requirement on (A) through (E). Specifically, the United States is a party to the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography. The Optional Protocol requires, *inter alia*, that state parties support the restoration of child pornography victims and provide them with "access to *adequate* procedures to seek . . . damages from those legally responsible."[5] Twice the United States has expressly identified 18 U.S.C. §2259 in reports to the United Nations as the law by which it complies with its treaty obligations to support victim recovery.

In its most recent report on treaty compliance, the United States cites specifically to Petitioner Paroline's offense (child pornography possession under 18 U.S.C. §2252) and states that the offense gives rise to "mandatory restitution" for the "full

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for this crime. This is important as a remedy for these children, and as a deterrent to prevent future situations of child sex abuse of this kind.

[5] Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography art. 9(4), *opened for signature* May 25, 2000, T.I.A.S. No. 13,095, 2171 U.N.T.S. 227 (entered into force Jan. 18, 2002; United States ratified Dec. 23, 2002) ("Optional Protocol") (emphasis added).

amount of the victim's losses."[6] Moreover, because the United States cites no other legal process satisfying its Article 9 obligations to provide a recovery mechanism for child pornography victims, this Court should not impose a level of causation that would render the statute functionally ineffective in the twenty-first century.

The Court is encouraged to interpret 18 U.S.C. §2259 with a respect for the evolving international legal norms that nations are collaboratively developing to protect children and combat a rapidly expanding global child pornography market. The Court should also be mindful of the United States' active role in helping to develop these legal norms, which include robust protections and support for victim care and restoration. Finally, the Court should interpret 18 U.S.C. §2259 with an accurate understanding of the challenges the international community faces both in eliminating the child pornography market and supporting the restoration of the children victimized by the production, distribution, and possession of the images of their abuse. That understanding should compel the Court to read the statute as simply as it is written: providing full, meaningful restoration to child pornography victims.

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[6] U.S. Dep't of State, *Periodic Report of the United States of America and U.S. Response to Recommendations in Committee Concluding Observations of June 25, 2008*, para. 421 (Jan. 22, 2010).

ARGUMENT

I. INTERNATIONAL LAW COMPELS NATIONS TO SUPPORT THE RESTORATION OF CHILD PORNOGRAPHY VICTIMS.

A. The United States' Treaty Obligations Compel Reading the Mandatory Restitution Statute without a Proximate Cause Requirement.

The United States' treaty obligations must guide the Court's interpretation of 18 U.S.C. §2259 ("Mandatory Restitution Statute"). The United States was an active participant in the drafting of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography,[7] and was one of the first nations to sign

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[7] The Netherlands also actively participated in the drafting of the Optional Protocol alongside the United States. U.N. Commission on Human Rights, *Question of a Draft Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, as Well as Basic Measures Needed for Their Eradication: Report of the Working Group on Its Second Session*, 3, U.N. Doc. E/CN.4/1996/101 (Mar. 25, 1996). It is critical for the Court to appreciate the significant role that the United States has assumed in helping set the standards of the evolving normative legal framework for child pornography crimes internationally, including victim restoration. The fact that the United States required no new legislation after it ratified the Optional Protocol evidences this fact. U.S. Dep't of State, *Initial Report of the United States of America to the U.N. Committee on the Rights of the Child Concerning the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* para. 3 (Sept. 14, 2007) ("Initial Report"). The Optional Protocol and the federal statutory framework lined up precisely. *Id.* The

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it. The United States subsequently ratified the Optional Protocol and became obligated as a state party to ensure that sexually exploited children, including child pornography victims, receive medical and psychological services for their full reintegration into society. Optional Protocol, *supra* note 5, at art. 9(3); *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography Ratification Status*, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_n=IV-II-c&chapter=4&lang=en (last visited Nov. 19,

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same was true for International Labour Organization Convention No. 182 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, *opened for signature* June 17, 1999, 2133 U.N.T.S. 161 ("ILO Convention No. 182"); S. Exec. Rep. No. 106-12, at 4 (1999). The United States also participated in the drafting of the Council of Europe Convention on Cybercrime, and once again, treaty provisions resembled the United States' legal framework with regard to child pornography crimes. Convention on Cybercrime, *opened for signature* Nov. 23, 2001, T.I.A.S. No. 13,174, C.E.T.S. No. 185; S. Exec. Rep. No. 109-6, at 2, 6 (2005). (Section I.B *infra* describes all of these treaties in more detail.) The United States was more active than any other government in the drafting of the Convention on the Rights of the Child. Human Rights Watch, *Q&A: The Convention on the Rights of the Child* (Nov. 18, 2009); Office of the United Nations High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of the Child*, vol. 1, at iii, U.N. Doc. HR/PUB/07/1 (2007); Cynthia Price Cohen, *Role of the United States in Drafting the Convention on the Rights of the Child: Creating A New World For Children*, 4 Loy. Poverty L.J. 9 (1998). The United States proposed text or amendments for thirty-eight out of the Convention's forty substantive articles, including several regarding exploitation, abuse, and the rehabilitation and reintegration of victims. Human Rights Watch, *supra*.

2013). The Optional Protocol additionally and expressly requires that parties "ensure that *all* child victims have access to adequate procedures to seek . . . damages from those *legally* responsible." *Id.* at art. 9(4) (emphasis added). Those "legally responsible" include offenders found guilty of child pornography possession. *Id.* at art. 3(1)(c). Moreover, the Optional Protocol requires that the United States and other state parties ensure that victims of child pornography have access to procedures that are *adequate* and non-discriminatory. *Id.* at art. 9(4) (emphasis added).

From the beginning, the United States has relied expressly and specifically on 18 U.S.C. §2259 to fulfill its treaty obligations under Article 9 of the Optional Protocol. The United States first cited the Mandatory Restitution Statute in 2007 in its initial report to the United Nations Committee on the Rights of the Child ("U.N. Committee") regarding the United States' implementation of the Optional Protocol domestically. Initial Report, *supra* note 7, at 24. The United States' Initial Report explained that 18 U.S.C. §2259 provides "mandatory restitution for any offense involving the sexual exploitation of children." *Id.* at para. 89. Nowhere does the United States mention proximate cause in its report.

In 2010, the United States submitted a periodic report on its compliance with the Optional Protocol and again expressly cited 18 U.S.C. §2259 as providing "mandatory restitution for child sexual exploitation and other abuse offenses" including 18 U.S.C. §2252, which was the child pornography offense to which the offender in this case (Randall Paroline) pled guilty.

U.S. Dep't of State, *supra* note 6, at para. 421. The United States expressly explained in its 2010 report that restitution is mandatory and for the "full amount of the victim's losses . . . ." *Id.* The United States cited no other statutory remedy supporting the restoration of child pornography victims. *Id.*

After receiving the United States' Initial Report on its compliance with the Optional Protocol, the U.N. Committee requested additional information, including data for the years 2005, 2006, and 2007 regarding "The number of child victims provided with recovery assistance as indicated in Article 9, paragraphs 3 and 4 of the Protocol." U.N. Committee on the Rights of the Child, *Lists of Issues to be Taken Up in Connection with the Consideration of the Initial Report of the United States of America*, para. 1(c), U.N. Doc. CRC/C/OPSC/USA/Q/1 (Feb. 26, 2008). The United States' response did not indicate that a single victim had received compensation from an offender under the Mandatory Restitution Statute or any other statute despite the fact that 18 U.S.C. §2259 was the cornerstone of the United States' statement of compliance with Article 9, paragraph 4. U.N. Committee on the Rights of the Child, *United States Response to Lists of Issues to be Taken Up in Connection with Consideration of the Initial Report of the United States of America*, U.N. Doc. CRC/C/OPOSC/USA/1/Add.1 (May 15, 2008). Instead, the United States indicated that some victims "may be eligible" for a variety of government programs such as Medicaid, Temporary Assistance for Needy Families ("TANF"), and Job Corp. *Id.* In its Concluding Observations regarding the United States' Initial Report,

the U.N. Committee identified the United States as "one of the world's largest producers, distributors and consumers of child pornography" and expressly encouraged the United States, *inter alia*, to "[i]mprove *enforcement* of the existing legislative framework on child pornography." U.N. Committee on the Rights of the Child, *Concluding Observations: United States of America*, para. 27, U.N. Doc. CRC/C/OPSC/USA/CO/1 (June 25, 2008) (emphasis added).

In 2012, the U.N. Committee again identified victim restoration (including compensation to victims) as an issue in response to the United States 2010 periodic report, and requested additional information. U.N. Committee on the Rights of the Child, *List of Issues Concerning Additional and Updated Information Related to the Second Periodic Report of the United States of America*, para. 12, U.N. Doc. CRC/C/OPSC/USA/Q/2 (July 25, 2012). Specifically, the U.N. Committee asked for an indication of the measures taken by the United States to ensure that victims "are provided with appropriate assistance for their full social reintegration, physical, psychological and psychosocial recovery, as well as compensation." *Id.* In its response, the United States again failed to identify even one specific measure that it is taking to ensure compensation to child pornography victims. U.N. Committee on the Rights of the Child, *List of Issues Concerning Additional and Updated Information Related to the Consideration of the Second Periodic Report of the United States of America: Written Replies of the United States of America*, U.N. Doc. CRC/C/OPSC/USA/Q/2/Add.1 (Dec. 12, 2012). Thus,

in its Concluding Observations, the U.N. Committee expressed concern "about the growing availability of child pornography online, the use of ever younger children and the increase in the violence of images recorded" as well as the fact that sexually exploited children in the United States "still lack adequate . . . compensation." U.N. Committee on the Rights of the Child, *Concluding Observations on the Second Periodic Report of the United States of America*, paras. 27, 44, U.N. Doc. CRC/C/OPSC/USA/CO/2 (July 2, 2013). "Adequate remedy and reparation should be sought legally and through other means," according to the U.N. Committee in addressing the United States' treaty obligations under Articles 8 and 9 of the Optional Protocol. *Id.* at para. 45.

The Optional Protocol also requires that state parties' criminal justice systems make "the best interest of the child" a "primary consideration" in the treatment of child victims. Optional Protocol, *supra* note 5, at art. 8(3). In interpreting 18 U.S.C. §2259, this Court should consider whether the United States' treaty obligations under article 8(3) of the Optional Protocol compel the Court to consider the "best interest of the child" in deciding whether to impose a proximate cause requirement on the plain language of the Mandatory Restitution Statute.

The Court has held that a treaty is on "the same footing and made of like obligation, with an act of legislation." *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *Medellin v. Texas*, 552 U.S. 491, 504-07 (2008). When a statute and a treaty conflict, the Court will

give meaning to both, if it can, without violating the language of either. Otherwise, the latter in time controls. *Whitney*, 124 U.S. at 194 (noting that if the treaty is later in time, it must be self-executing). While the Optional Protocol is not self-executing, it is the latter in time and by interpreting 18 U.S.C. §2259 without imposing a proximate cause requirement on the statute, the Court can and should give effect to both the statute and the treaty without violating the language of either.

B. Evolving International Legal Norms Support Restoration of Child Pornography Victims.

Both the United States and the Netherlands have been actively involved in developing an international normative legal framework that includes a significant and express focus on the protection of children from sexual exploitation and the restoration of child victims who are exploited. In interpreting the laws of the United States, the Court has turned to international law to assess the evolving standards of decency. *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988). As the Court interprets the Mandatory Restitution Statute, it should consider the international norms that have been evolving during the last century.

In 1924, the League of Nations adopted the first international instrument recognizing the inherent uniqueness of childhood and committing to provide

children with special care and protection. Geneva Declaration of the Rights of the Child, Sept. 26, 1924, League of Nations, O.J. Spec. Supp. 21 at 43 (1924) (expressly stating that children should be protected from "every form of exploitation"). The United Nations 1959 Declaration of the Rights of the Child[8] followed twenty-five years later and expanded on the original principles of the 1924 Geneva Declaration and incorporated references to the United Nations Charter and the Universal Declaration of Human Rights,[9] making clear that children are entitled to all human rights previously recognized as well as additional rights due to their special status as children. Both the United States and the Netherlands actively participated in the drafting of the 1959 Declaration. Geraldine Van Bueren, *The International Law on the Rights of the Child* 10 (1998).

Principle 2 of the 1959 Declaration states that children "shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable [them] to develop physically, mentally, morally, spiritually and socially in a healthy and

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[8] Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), GAOR 14th Sess., Supp. No. 16, U.N. Doc. A/4249 (Nov. 20, 1959) (asserting that "mankind owes to the child the best it has to give" and "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection . . . .").

[9] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217 (III) (Dec. 10, 1948) (recognizing childhood is entitled to "special care and assistance").

normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration." Declaration of the Rights of the Child, *supra* note 8, at princ. 2. Principle 9 further provides that children "shall be protected against all forms of neglect, cruelty and exploitation. [They] shall not be the subject of traffic, in any form." *Id.* at princ. 9. It is important to note that these were unanimous values shared by the international community on the historical eve of the significant growth of the child pornography market in the 1960s and 1970s. *See infra* Section II.A.

At the end of the first wave of growth in the twentieth century child pornography market, the international community celebrated the world's children with the "International Year of the Child" in 1979, which commenced the drafting process of the world's first binding children's rights treaty, the United Nations Convention on the Rights of the Child. The drafting of the Convention on the Rights of the Child involved more than seventy countries (including the United States and the Netherlands) and spanned ten years. Office of the United Nations High Commissioner for Human Rights, *supra* note 7.

The Convention on the Rights of the Child was introduced to the United Nations General Assembly in 1989, just four years after the first child pornography network was identified on the Internet. Yaman Akdeniz, *Internet Child Pornography and the Law: National and International Responses* 5 (2008). The

Convention on the Rights of the Child was adopted unanimously by the General Assembly and broke records for the greatest number of signatories to a treaty on the day it opened for signature. Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3; Jean Koh Peters, *How Children Are Heard in Child Protective Proceedings, in the United States and Around the World in 2005: Survey Findings, Initial Observations, and Areas for Further Study*, 6 Nev. L.J. 966, 970 (2006). Today the Convention on the Rights of the Child is the most widely ratified human rights treaty in the world and sets universal standards for the protection of children for countries to strive towards and by which they agree to be measured. *Convention on the Rights of the Child Ratification Status*, United Nations Treaty Collection Database, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (last visited Nov. 12, 2013). While the United States has not yet ratified the Convention on the Rights of the Child, it signed the Convention on February 16, 1995, following active participation in the drafting process. *Id.* Further, this Court has relied on the near universal ratification of the Convention on the Rights of the Child in gauging the weight of international opinion affirming the Court's decision. *See Roper v. Simmons*, 543 U.S. 551, 575-79 (2005) (finding unconstitutional the imposition of the death penalty for juvenile offenders).

The Convention on the Rights of the Child requires that countries take all appropriate measures to promote physical and psychological restoration and social reintegration of a child victim of exploitation, abuse, or any other form of "cruel, inhuman or degrading treatment." Convention on the Rights of the Child, *supra* at art. 39. While the United States has only signed the Convention, Article 18 of the Vienna Convention on the Law of Treaties requires a nation not to defeat the purpose of a treaty before ratification. Vienna Convention on the Law of Treaties art. 18, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.[10]

Other international treaties also evidence the rise of an international norm in the twentieth century recognizing that children have a right to special protections. International Covenant on Civil and Political Rights art. 24, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (United States ratified June 8, 1992) (noting a child's right to "measures of protection" from state, society, and the child's family). Nations have gone further in developing international instruments that require state parties to provide assistance for victims' physical and psychological restoration. Declaration on

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[10] Similar to the Convention on the Rights of the Child, the United States has signed but not ratified the Vienna Convention on the Law of Treaties. However, the United States State Department has recognized many of its provisions as customary international law. Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 Va. J. Int'l L. 281, 298 (1988).

the Elimination of Violence against Women, G.A. Res. 48/104, art. 2, 3, 4(d), 4(g), U.N. Doc. A/RES/48/104 (Dec. 20, 1993); ILO Convention No. 182, *supra* note 7, at art. 7(2)(b). In ratifying ILO Convention No. 182, the Senate did not specifically reference 18 U.S.C. §2259 but recognized that the United States already criminalized child pornography and that "U.S. law is sufficient in order for the United States to comply with the Convention." S. Exec. Rep. No. 106-12, *supra* note 7, at 4. Together, these instruments, along with others, convey an emerging international norm condemning child sexual abuse and child pornography, and compelling state parties to develop laws to protect and care for children and support their restoration when harmed.

In recognizing the need to provide restoration services to child pornography victims, the United States enacted the Mandatory Restitution Statute as part of the Violence Against Women Act, Pub. L. No. 103-322, §40113, 108 Stat. 1796, 1907 (1994). Following the enactment of the Mandatory Restitution Statute, the United States participated in three World Congresses against Commercial Sexual Exploitation of Children. The First World Congress called on governments to provide recovery services to sexually exploited children. First World Congress against Commercial Sexual Exploitation of Children, *The Stockholm Declaration and Agenda for Action against Commercial Sexual Exploitation of Children* 5 (1996). The Second World Congress recognized that the development of technology created more difficulties for

victims and called on countries to help victims recover and reintegrate into society. Vitit Muntarbhorn, *General Rapporteur's Report from Second World Congress against CSEC* (2001). At the conclusion of the Second World Congress, the United States pointed to the Optional Protocol as providing a "clear starting point" for the international elimination of the sexual exploitation of children. United Nations Children's Fund, *The Yokohama Global Commitment* (2001). Between the Second and Third World Congresses, the United States conducted a "mid-term review" on the commercial sexual exploitation of children in America in collaboration with three non-governmental agencies. Initial Report, *supra* note 7, at para. 84. A report from the mid-term review was submitted at the Third World Congress and found that the United States Congress and Executive Branch had "aggressively" confirmed their commitment to combat the sexual exploitation of children through legislative measures, including the recognition and protection of victims' rights. Shared Hope International et al., *Report from the U.S. Mid-Term Review on the Commercial Sexual Exploitation of Children in America* pmbl., add. III at 5 (2006).

The Council of Europe has also formed treaties to protect children from child sexual abuse. The United States actively participated in the drafting of the Council of Europe's Convention on Cybercrime, which requires states to adopt legislative and other measures necessary to criminalize possession of child pornography on data storage media. S. Exec. Rep. No. 109-6, *supra* note 7, at 2; Convention on Cybercrime,

supra note 7, at art. 9(1). The United States ratified the treaty in 2006 with no need for implementing legislation because the United States had complied with the Convention on Cybercrime's provisions prior to the drafting of the convention. S. Exec. Rep. No. 109-6, *supra* note 7, at 6.

Four years later, the Lanzarote Convention expanded on the Convention on Cybercrime to require state parties to take all necessary measures to assist victims with their physical and psycho-social restoration and adopt a protective approach towards victims. Lanzarote Convention, *supra* note 2, at art. 30(2). Although the United States has not ratified the Lanzarote Convention, it participated in the drafting of the treaty and has been a permanent observer of the Council of Europe since 1995. Council of Europe, On Observer Status for the United States of America, Comm. of Ministers Res. (95) 37 (1995); Council of Europe, *Explanatory Report: Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse* para. 284 (2007). Moreover, the Lanzarote Convention is additional evidence of emerging international legal norms focused on criminalizing modern child pornography and providing for the restoration of victims.

The European Union requires member states to punish the "acquisition or possession of child pornography" and "knowingly obtaining access," including incitement or aiding and abetting. Framework Decision 2004/68/JHA, art. 3(1)(d), 2003 O.J. (L13) 44; Directive 2011/92/EU, *supra* note 2, at art. 5(2)-(3),

7(1). Significantly, in accordance with the Optional Protocol, the Convention on the Rights of the Child, and the Lanzarote Convention, the new legislation will oblige member states to provide assistance, support, and protection to victims, taking into account the best interests of the child. Directive 2011/92/EU, *supra* note 2, at art. 18(1). Among other things, this includes ensuring that victims have access to free legal representation for "the purpose of claiming compensation." *Id.* at art. 20(2).

Furthermore, member states must ensure that victims receive assistance and support before, during, and after the criminal proceedings so that they may "exercise their rights set out in Framework Decision 2001/220/JHA." *Id.* at art. 19(1). Framework Decision 2001/220/JHA directs member states to ensure that victims of crime receive adequate protection, acknowledgement of their rights, and special assistance. Framework Decision 2001/220/JHA, of 15 March 2001 on the Standing of Victims in Criminal Proceedings 2001 O.J. (L082) 1.

The European Union has recently expanded the rights, support, protection, and compensation for victims of crime, including an acknowledgement of Directive 2011/92/EU, by implementing Directive 2012/29/EU, which will replace Directive 2001/220/JHA in 2015. Directive 2012/29/EU, of the European Parliament and of the Council of 25 October 2012 Establishing Minimum Standards on the Rights, Support and Protections of Victims of Crime, and Replacing Council Framework Decision 2001/220/JHA, 2012 O.J.

(L315) 57. It instructs member states to protect victims from continuing victimization and ensure that victims receive "appropriate support to facilitate their recovery." *Id.* at pmbl. para. 9. Victim support services must provide, at a minimum, emotional and psychological support services. *Id.* at art. 9. Member states must ensure that victims also have the right to receive compensation from offenders through a judgment in criminal proceedings. *Id.* at art. 16(1). Member states are obliged to promote measures to "encourage offenders to provide adequate compensation to victims." *Id.* at art. 16(2). The new Directive 2012/29/EU demonstrates the European Union's evolving standards on crime victim standing, and when read in conjunction with Article 19 of Directive 2011/92/EU, it furthers the aim to provide greater compensation and support for victims of child pornography.

In sum, the United States and European nations, including the Netherlands, have played an active role in developing an international legal framework that condemns child sexual abuse and the proliferation of child sexual abuse images. This framework also recognizes the harm done to victims and the need to provide for their restoration. Under the Optional Protocol, the United States has identified the Mandatory Restitution Statute as its means of ensuring that child pornography victims have access to recovery from offenders. By not imposing proximate cause on subsections (A)-(E) of 18 U.S.C. §2259, the United States gives effect to the statute, Article 9 of the Optional Protocol, and the normative international

legal framework that the United States has actively worked to create with other nations to combat child sexual abuse.

II. MODERN TECHNOLOGIES ADD CHALLENGING COMPLEXITIES TO THE ANCIENT CRIME OF CHILD SEXUAL ABUSE.

A. The Child Pornography Market in the Digital Age Compels a Comprehensive Legal Response by the United States.

In many countries, including the United States, the sexual abuse of children has been condemned for hundreds of years, yet the invention of photography in 1839 added an element of complexity to this ancient crime. National Rapporteur on Trafficking in Human Beings, *First Report of the Dutch National Rapporteur: Child Pornography* 33 (2011) (Neth.); *see* Christian Laes, *Children in Ancient Rome* 244 (2006); *see* John E.B. Myers, *A Short History of Child Protection in America*, 42 Fam. L.Q. 449 (2008); *see* John Lascaratos & Effie Poulakou-Rebelakou, *Child Sexual Abuse: Historical Cases in the Byzantine Empire (324-1453 A.D.)*, 24 Child Abuse & Neglect 1085 (2000). For the first time, a person could memorialize the sexual abuse of a child and use those images to continue to abuse the child. DNR, *supra*, at 34. The child sexual abuse images themselves became the currency in a market commonly referred to as "child pornography," in which the creation, distribution, and possession of child sexual abuse images perpetuate the sexual abuse of children and normalizes conduct

that most civilizations have condemned. Suzanne Ost, *Child Pornography and Sexual Grooming* 109 (2009); Laes, *supra*, at 244; Lascaratos, *supra*.

The technological limitations of cameras and the physical limitations on delivery methods, such as postal services, restricted the growth of the child pornography market for more than one hundred years. U.S. Sentencing Comm'n, *Report to Congress: Federal Child Pornography Offenses* 5, 41, 328 (Dec. 2012); DNR, *supra*, at 35-48. However, with the introduction in the mid-twentieth century of cameras that were affordable and easier to use, technological advances again contributed to a significant expansion of the child pornography market, especially when coupled with a loosening in the 1960s and 1970s of social mores with regard to human sexuality. DNR, *supra*, at 34. Because the significant expansion in the child pornography market during this period was evident in the United States and Europe, nations responded with tighter and more effective legal protections for children.[11]

In the United States, Congress criminalized child sexual abuse images in the late twentieth century,

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[11] In the 1970s, countries began to enact laws that tightened prohibitions on child pornography, which included banning the commercialization of child sexual abuse images. Prior to tightening regulations, child sexual abuse images were commercially available alongside adult pornography in many countries. Child pornography activities were made into criminal offenses in the Netherlands in 1986. DNR, *supra*, at 34-37.

and this Court upheld the rights of states to adopt legislation banning the production and distribution of child pornography. *New York v. Ferber*, 458 U.S. 747 (1982); Protection of Children against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7 (1978). In doing so, the Court recognized the continuing harm inherent in child pornography. *Ferber*, 485 U.S. at 759 n.10 ("Because the child's actions are reduced to a recording, the pornography may haunt . . . [the child] in future years, long after the original misdeed took place."). In *Osborne v. Ohio*, the Court later upheld the criminalization of possession of child sexual abuse images, reiterating that continuing victimization is inherent to child pornography crimes. 495 U.S. 103, 111 (1990) ("The pornography's continued existence causes the child victim's continuing harm by haunting the children in years to come.").

Four years after *Osborne*, the United States Congress enacted 18 U.S.C. §2259, mandating that offenders at all points in the child pornography market (production, distribution, and possession) pay full restitution to victims. Mandatory restitution was part of a comprehensive federal statutory framework that also included clear definitions and criminalizing participation at any stage of the child pornography market. 18 U.S.C. §§2251-2260. Recently, the United States Congress responded to the increasingly global nature of child sexual crimes by enacting the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act (PROTECT Act), which, *inter alia*, allows authorities in the United States to

prosecute citizens of the United States when they sexually abuse children abroad. 18 U.S.C. §2423 (2012). Similar to the PROTECT Act, a plain reading of the Mandatory Restitution Statute provides a more robust tool to protect children in light of rapidly changing technologies and the increasingly transnational nature of child sexual abuse.

The United States' domestic and international efforts are appropriate because unfortunately, the United States is the most common country of origin for child pornography victims. DNR, *supra*, at 166 n.315 (relying on images being compiled in Interpol's International Child Sexual Exploitation Database). The United States also is the leading source country for perpetrators. *Id.* at 82, 166 n.316 (citing to an ECPAT International report indicating that between 50,000 and 100,000 pedophiles participate in organized child pornography groups around the world and one-third of those operate from the United States). The significant number of child sexual abuse images produced in the United States allows perpetrators in other countries to continue the victimization of American children by distributing or possessing their child sexual abuse images. *See, e.g.*, Philip Jenkins, *Beyond Tolerance: Child Pornography on the Internet* 184-203 (2001) (noting the "global community" of child pornography collectors). Similarly, children of other countries, including Dutch children, continue to be victimized in the United States by perpetrators who distribute or possess images of the child's abuse. *Id.*; *see infra* Section II.D.

B. Child Pornographers Collectively Continue the Victimization of Children Globally and Indefinitely.

The United States' statutory framework attempts to respond to the rise of digital technologies and the widespread use of the Internet in the late twentieth century, which together facilitated the explosive growth in the child pornography market that we continue to witness today. Millions of individual users consume more than fifteen million child sexual abuse images in a market currently valued between three and twenty billion United States dollars annually. Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, *Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography*, paras. 10, 44, Human Rights Council, U.N. Doc. A/HRC12/23 (July 13, 2009) (by Najat M'jid Maalla) ("United Nations Special Rapporteur Report"). Moreover, with the rapid proliferation of Internet usage, the child pornography market is projected to continue growing exponentially.[12]

The transformation from tangible to digital child sexual abuse images has had a debilitating effect on victims, as well as the governments committed to

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[12] Between 1996 and 2009, the number of people with Internet access has increased from 100 million to 1.25 billion and continues to rise. Robert J. Edelmann, *Exposure to Child Abuse Images as Part of One's Work: Possible Psychological Implications*, 21 J. Forensic Psychiatry & Psychol. 481 (2010).

battling this crime. Because images of the child's victimization are now digitalized, it is virtually impossible to destroy them permanently. U.S. Sentencing Comm'n, *supra*, at 112; U.S. Dep't of Justice, *The National Strategy for Child Exploitation Prevention and Interdiction* 9 (2010); DNR, *supra*, at 75. Thus, images of the child's sexual abuse exist indefinitely. Moreover, the Internet compounds this challenge because child sexual abuse images can be easily distributed and consumed countless times around the world by millions of unidentified perpetrators. DNR, *supra*, at 75. Today's child pornography victims experience continuing victimization by perpetrators who together perpetuate the distribution and possession of the victims' sexual abuse images indefinitely.[13] Jenkins, *supra*, at 187-95. Worse, as the child pornography market grows exponentially and transnationally, the majority of the perpetrators are never apprehended, which makes the prosecution of perpetrators and the restoration of victims especially challenging.

As child pornography victims grow older, many come to realize that the images of their sexual abuse will continue to exist and be consumed for the remainder of their lives, and they are largely powerless

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[13] Many child pornography market participants engage in all three market stages (creation, distribution, and possession), but even those who only enter the market at one point collectively participate in a market that at every stage victimizes some of the most vulnerable members of society and then perpetuates that victimization indefinitely. *See* United Nations Special Rapporteur Report, *supra*, at 10-11.

to end the abuse.[14] U.S. Sentencing Comm'n, *supra*, at 112; U.S. Dep't of Justice, *supra*, at 9; DNR, *supra*, at 36, 50, 75-77. This knowledge may haunt the victims for years because possessors and distributors will continue to consume, and possibly distribute, the images and recordings. DNR, *supra*, at 75. A recent survey revealed that almost ninety-five percent of victims suffer lifelong psychological damage and may never overcome the harm, even after lifelong therapy. U.S. Dep't of Justice, *supra*, at D-12. The continued victimization can take an extreme physical, psychological, and financial toll on the victim and the victim's family. *See* U.S. Sentencing Comm'n, *supra*, at 112; Julia von Weiler et al., *Care and Treatment of Child Victims of Child Pornographic Exploitation (CPE) in Germany*, 16 J. of Sexual Aggression 211, 218-19 (2010). Victims of child pornography may have difficulty maintaining jobs and relationships because of the fear that people they interact with have viewed the abuse images and will recognize them. *See* U.S. Sentencing Comm'n, *supra*, at 113. They also worry that perpetrators will use their abuse images for the purposes of grooming other children in order to facilitate subsequent sexual abuse; sexual grooming

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[14] Child sexual abuse images are becoming more violent and graphic as perpetrators demand younger victims, vaginal and anal penetration (sometimes with sex toys and foreign objects), rape, bestiality, defecation and urination, bondage, torture, and other sadistic behavior. U.S. Sentencing Comm'n, *supra*, at 85, 90-92; Internet Watch Foundation, *Annual and Charity Report* 8 (2008).

further expands the market and increases the number of victims. *Id.*

The psychological damage that child pornography victims suffer is experienced across cultures. For example, German victims report feelings of shame, hate, disgust, loathing, fear, repression, guilt, and speechlessness. Von Weiler, *supra*, at 214. Victims in the United States have also reported feelings of depression, anger, withdrawal, low self-esteem, and feelings of worthlessness. Terre des Hommes, *Full-screen on View: An Exploratory Study on the Background and Psychosocial Consequences of Webcam Child Sex Tourism in the Philippines* 12 (2013). The mere knowledge of the existence and circulation of the images of the victim's sexual abuse causes feelings of shame, humiliation, and powerlessness. *Id.* at 13. Unfortunately, these feelings do not dissipate over time, but rather intensify to feelings of deep despair, worthlessness, and helplessness. *Id.* A recent study of Filipino children who were engaged by Westerners to participate in live digital sexual abuse via the Internet ("webcam sex") similarly demonstrated significantly higher rates of post-traumatic stress and feelings of low self-esteem, worthlessness, shame, guilt, and being contaminated, particularly after learning that the images of their sexual abuse may be available on the Internet indefinitely. *Id.* at 41, 43.

Compounding the problems faced by victims of child pornography, a recent survey among German

victim assistance professionals found that professionals are ill equipped to deal with the type of psychological damage suffered by child pornography victims; thus, it is difficult for victims to find effective therapeutic support. Von Weiler, *supra*, at 218. The professionals in the von Weiler study indicated that "working with victims of [child pornographic exploitation] is more complex than working with child sexual abuse victims." *Id.* at 217. The difference in the psychological harm suffered by child pornography victims compared to victims of other crimes is the permanent presence of the material on the Internet. When the victim fully understands this reality, feelings of helplessness, powerlessness, shame, and fear contribute to additional psychological stress. These victims, thus, have a higher susceptibility to post-traumatic stress disorder, depression, and psychoses. *Id.* at 214-19. Two-thirds of professionals working with child pornography victims reported that they *themselves* felt "deep feelings of helplessness" because the victim's sexual abuse images on the Internet were permanent. *Id.* at 217 (emphasis added). Indeed, one-third of the professionals treating child pornography victims experienced thoughts such as "in this situation healing becomes impossible." *Id.*

C. Due to the International Nature of Child Pornography in the Twenty-First Century, Imposing a Proximate Cause Requirement on the Plain Text of 18 U.S.C. §2259 Would Impede the Full Restoration of Child Pornography Victims.

As discussed in more detail in Section I, *supra*, the international community recognizes the rights of victims of child pornography to rehabilitation, social reintegration, and restoration (whether through restitution, damages, or some other method). However, the increasingly transnational nature of child pornography means that many perpetrators harm victims across national borders through the distribution or possession of the victim's child sexual abuse images digitally. A recent study by United States' law enforcement agencies found that 11.8 million unique *international* IP addresses engaged in peer-to-peer file sharing of child pornography between October 2008 and October 2009. U.S. Dep't of Justice, *supra*, at 14 (emphasis added). During that same period, 9.7 million unique IP addresses in the United States engaged in peer-to-peer file sharing of child sexual abuse images. *Id.* A 2012 report by the Internet Watch Foundation in the United Kingdom found that out of the 9,477 reports of websites hosting child sexual abuse content outside of the United Kingdom, fifty-four percent were hosted in North America, thirty-seven percent were hosted in Europe, and eight percent were hosted in Asia. Internet Watch Foundation, *supra* note 14, at 14. In 2011, a transnational investigation resulted in the shutdown of a

child pornography network, boylover.net, which hosted 70,000 members worldwide. The investigation was coordinated among thirteen different countries, including the United States and the Netherlands, and resulted in the identification of 670 suspects, 184 arrests, and the safeguarding of 230 children. *More than 200 Children Identified and Rescued in Worldwide Police Operation*, Europol (Mar. 16, 2011), https://www.europol.europa.eu/content/more-200-children-identified-and-rescued-worldwide-police-operation.

The transnational and digital nature of the child pornography market severely restricts the ability of victims to pursue restitution from most perpetrators. Most countries do not have adequate child pornography laws, including the criminalization of child pornography. *See* DNR, *supra*, at 54-55. Further, the patchwork nature of child pornography laws across jurisdictions hampers both law enforcement and the ability of victims to pursue restoration. Many perpetrators live thousands of miles away and are never apprehended, let alone prosecuted. If a perpetrator were convicted, the cost to the victim in pursuing restitution in a foreign jurisdiction would be considerable, making recovery both impractical and unlikely. Even when a perpetrator is convicted in the victim's own jurisdiction (assuming there are legal protections), a court cannot determine the specific restitution proximately caused by a single offender among an unknown number of offenders at a certain place and point in time when the harm continues indefinitely. Imposing a proximate cause requirement on 18 U.S.C. §2259 makes the Mandatory Restitution

Statute unworkable, and thus, ineffective for victim restoration. That is the fundamental problem that is solved by the Fifth Circuit's plain reading of 18 U.S.C. §2259.

D. Dutch Lawmakers Are Also Formulating Legal Solutions to Ensure Compensation to Child Pornography Victims.

Like the United States, the Netherlands is also trying to implement an effective legal scheme to ensure compensation to victims of child pornography. The central provision in the Dutch Criminal Code on child pornography criminalizes "an individual who distributes, offers, openly exhibits, produces, imports, conveys, exports, acquires, has possession of or knowingly gains access to" child sexual abuse images. Wetboek van Strafrecht [Sr] [Criminal Code] art. 240b (Neth.). The Netherlands added "knowingly gaining access" to this list, in response to the Lanzarote Convention, which further defines the criminalized possession of pornography to include viewing of child sexual abuse images using recently developed technologies such as "cloud storage" that do not require the downloading of images. *Id.*

While Dutch law does not provide the same kind of victim restoration as in 18 U.S.C. §2259, Sr art. 36f does mandate victim compensation for all criminal acts. Sr art. 36f (Neth.). Under this section, offenders may be obliged to pay compensation to the State, which transfers the sum without delay to the victim. Sr art. 36f (Neth.). In addition, this section connects

compensation in criminal proceedings to the notion of liability in accordance with tort law. Like Dutch criminal law in general, Sr art. 36f incorporates a causality theory of "reasonable attribution," which is a comprehensive amalgamation of all older theories of causality that have proven inadequate under certain circumstances. Jaap de Hullu, *Materieel Strafrecht: Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht* 173-84 (4th ed. 2009) (Neth.) (explaining why condition *sine qua non* and proximate cause do not suffice and how Dutch criminal law has adopted the doctrine of reasonable attribution consistent with tort law principles). The fundamental question underlying causality examines when a court can "reasonably attribute" damage to the perpetrator's conduct. This allows judges to weigh all the important circumstances in the case.

The National Rapporteur reads the Mandatory Restitution Statute's general causation requirement as similar to the Dutch theory of reasonable attribution, both of which are less strict standards of causation than proximate cause. In the case of possession of child pornography, the victim's harm can reasonably be attributed to the perpetrator's consumption of child pornography, as this continues the victimization indefinitely.

Dutch child pornography case law has been continuously evolving to affirm this causal connection where offenders are charged solely with possession. Similar to this Court's finding in *Osborne v. Ohio*, Dutch courts have held that offenders who collect

child pornography participate in the sexual abuse of children. *Osborne*, 495 U.S. at 111; Rb. Zutphen 18 november 2009, NJFS 2010, 42, ECLI:NL:RBZUT:2009: BK3742 (Neth.). More recently, a Dutch court of appeals held that a perpetrator contributed to the perpetuation of "this very grave violation of the interests of minors." Hof's-Gravenhage 2 juni 2011, ECLI:NL:GHSGR: 2011:BR5919 (Neth.). The judgment continued, "It is common knowledge that thereby [minors] can incur heavy psychological (and physical) damage, which can be detrimental to their further development. The accused should have realized that by his actions, he made a considerable contribution to the conservation of this extremely harmful worldwide industry."[15] *Id.*

Dutch courts have begun to impose joint and several liability principles on child pornography offenders. In 2010, the United States authorities arrested an individual charged with possession of child sexual abuse images that originated from the Netherlands.

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[15] *See also* Rb. Zeeland-West Brabant 11 juli 2013, ECLI: NL:RBZWB:2013:5231 (Neth.). The perpetrator was found guilty of child pornography and the court stated, "Child pornography is highly undesirable, in particular because its production involves sexual abuse and exploitation of children. The accused should be held partially responsible for that, because by collecting child pornography he contributed to the conservation of the demand for this material. As long as there are consumers of child pornography, people who produce and distribute it will continue to abuse children. To effectively combat child pornography, it is therefore not only necessary to address the producers, but definitely also to tackle the collectors."

Dutch law enforcement found the producer of the content and arrested him. The producer, Robert M., had worked in daycare centers for years, where he had sexually abused children and recorded the abuses for distribution. Robert M.'s husband, Richard van O., was charged with possession. The court held both offenders jointly and severally liable for damage caused to the victims through the possession of the images, and ordered Richard van O. to pay compensation to dozens of children depicted in the abuse materials.[16] Hof Amsterdam 26 april 2013, ECLI:NL:GHAMS:2013:BZ8895 (Neth./Richard van O.) (Neth.). Robert M. was solely liable to pay for the victims' damages caused by the original physical sexual abuse that was recorded in the images. *Id.* Although the offenders had a close personal relationship, the fact remains that Richard van O. was found jointly and severally liable for post-production damages to child pornography victims based solely on possession of the images. *Id.* The Netherlands' theory of causation and use of joint and several liability principles to multiple offenders makes for an efficient system where victims have reduced burdens to facilitate recovery of the costs for their restoration.

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[16] Robert M. and Richard van. O.'s liability derived from a violation of Article 8 of the European Convention on Human Rights, the right to private life. Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, *opened for signature* Nov. 4, 1950, C.E.T.S. No. 005.

CONCLUSION

The United States' treaty obligations and evolving international legal norms support providing meaningful recovery to child pornography victims through the Mandatory Restitution Statute to support their restoration. Imposing proximate cause on the plain language of subsections (A)-(E) would eviscerate the ability of child pornography victims to obtain adequate restitution for their losses from perpetrators who collectively perpetuate their victimization indefinitely through the production, distribution, and possession of child sexual abuse images all around the globe. This Court should interpret the Mandatory Restitution Statute so that the statute provides full, meaningful restoration to child pornography victims.

For these reasons, the Dutch National Rapporteur supports affirming the decision of the Fifth Circuit in all respects.

Respectfully submitted,

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RELEVANT EXCERPTS FROM INTERNATIONAL TREATIES RATIFIED BY THE UNITED STATES

The Optional Protocol to the United Nations Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography

Provision	Excerpts from the Optional Protocol
Preamble, para. 6	"Concerned about the growing availability of child pornography on the Internet and other evolving technologies . . . ."
Article 1	"State Parties shall prohibit . . . child pornography . . . ."
Article 2(c)	"Child pornography means any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes."
Article 3(1)	"Each state Party shall ensure that, as a minimum, the following acts and activities are fully covered under its criminal or penal law, whether these offences are committed domestically or transnationally or on an individual or organized basis: (c) Producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography as defined in Article 2."

Article 3(3)	"Each State Party shall make these offences punishable by appropriate penalties that take into account their grave nature."
Article 3(4)	"Subject to the provisions of its national law, each State Party shall take measures, where appropriate, to establish the liability of legal persons for offences established in paragraph 1 of the present Article. Subject to the legal principles of the State Party, this liability of legal persons may be criminal, civil or administrative."
Article 8(1)	"States Parties shall adopt appropriate measures to protect the rights and interests of child victims of the practices prohibited under the present Protocol at all stages of the criminal justice process, in particular by: (a) Recognizing the vulnerability of child victims and adapting procedures to recognize their special needs . . . ; (d) Providing appropriate support services to child victims throughout the legal process; (e) Protecting, as appropriate, the privacy and identity of child victims and taking measures in accordance with national law to avoid the inappropriate dissemination of information that could

	lead to the identification of child victims; (g) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting compensation to child victims."
Article 8(3)	"States Parties shall ensure that, in the treatment by the criminal justice system of children who are victims of the offences described in the present Protocol, the best interest of the child shall be a primary consideration."
Article 9(3)	"States Parties shall take all feasible measures with the aim of ensuring all appropriate assistance to victims of such offences, including their full social reintegration and their full physical and psychological recovery."
Article 9(4)	"States Parties shall ensure that all child victims of the offences described in the present Protocol have access to adequate procedures to seek, without discrimination, compensation for damages from those legally responsible."
Article 10(1)	"States Parties shall take all necessary steps to strengthen international cooperation by multilateral, regional and bilateral arrangements for the prevention, detection, investigation, prosecution and punishment of those responsible for acts involving . . . child pornography . . . ."

The Council of Europe
Convention on Cybercrime

Provision	Excerpts from the Convention on Cybercrime
Article 9(1)	"Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, the following conduct: (a) producing child pornography for the purpose of its distribution through a computer system; (b) offering or making available child pornography through a computer system; (c) distributing or transmitting child pornography through a computer system; (d) procuring child pornography through a computer system for oneself or for another person; (e) possessing child pornography in a computer system or on a computer data storage medium."

The International Labour Organization Convention No. 182 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour

Provision	Excerpts from ILO Convention No. 182
Article 3	"[T]he term 'the worst forms of child labour' comprises: (b) the use, procuring or offering of a child for . . . the production of pornography . . . ;"
Article 7(2)	"Each Member shall . . . take effective and time-bound measures to: (c) provide the necessary and appropriate direct assistance for the removal of children from the worst forms of child labour and for their rehabilitation and social integration;"
Article 8	"Members shall take appropriate steps to assist one another . . . through enhanced international cooperation and/or assistance . . . ."

The United Nations International Covenant on Civil and Political Rights

Provision	Excerpts from the International Covenant on Civil and Political Rights
Article 24(1)	"Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State."

RELEVANT EXCERPTS FROM INTERNATIONAL TREATIES SIGNED (BUT NOT RATIFIED) BY THE UNITED STATES

The United Nations Convention on the Rights of the Child

Provision	Excerpts from the Convention on the Rights of the Child
Preamble para. 7	"Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of . . . peace, dignity, tolerance, freedom, equality and solidarity . . . . "
Article 3(1)	"In all actions concerning children . . . [in] courts of law . . . the best interests of the child shall be a primary consideration."
Article 3(2)	"States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being . . . ."
Article 6(2)	"States Parties shall ensure to the maximum extent possible the survival and development of the child."
Article 16(1)	"No child shall be subjected to . . . unlawful interference with his or her privacy . . . nor to unlawful attacks on his or her honour and reputation."
Article 16(2)	"The child has the right to the protection of the law against such interference or attacks."

Article 19(1)	"States Parties shall take all appropriate legislative, administrative, social and education measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse . . . ."
Article 19(2)	"Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement."
Article 24(1)	"States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health."
Article 27(1)	"States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development."

Article 34	"States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent: (a) The inducement or coercion of a child to engage in any unlawful sexual activity; (b) The exploitative use of children in prostitution or other unlawful sexual practices; (c) The exploitative use of children in pornographic performance and materials."
Article 39	"States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child."

The United Nations International Covenant on Economic, Social and Cultural Rights

Provision	Excerpts from the International Covenant on Economic, Social and Cultural Rights
Article 10	"The States Parties to the present Covenant recognize that: (3) Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law . . . ."
Article 12(2)	"The steps to be taken by the States Parties to the present Covenant . . . shall include those necessary for: (a) [T]he healthy development of the child; (b) The creation of conditions which would assure to all medical service and medical attention . . . ."

RELEVANT EXCERPTS FROM OTHER INTERNATIONAL INSTRUMENTS

The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention)

Provision	Excerpts from the Lanzarote Convention
Article 11(1)	"Each Party shall establish effective social programmes and set up multidisciplinary structures to provide the necessary support for victims, their close relatives and for any person who is responsible for their care."
Article 14(1)	"Each Party shall take the necessary legislative or other measures to assist victims, in the short and long term, in their physical and psycho-social recovery. Measures taken pursuant to this paragraph shall take due account of the child's views, needs and concerns."
Article 14(2)	"Each Party shall take measures, under the conditions provided for by its internal law, to co-operate with non-governmental organisations, other relevant organisations or other elements of civil society engaged in assistance to victims."

Article 20(1)	"Each Party shall take the necessary legislative or other measures to ensure that the following intentional conduct, when committed without right, is criminalised: (a) producing child pornography; (b) offering or making available child pornography; (c) distributing or transmitting child pornography; (d) procuring child pornography for oneself or for another person; (e) possessing child pornography; (f) knowingly obtaining access, through information and communication technologies, to child pornography."
Article 24(1)	"Each Party shall take the necessary legislative or other measures to establish as criminal offences, when committed intentionally, aiding or abetting the commission of any of the offences established in accordance with this Convention."
Article 24(2)	"Each Party shall take the necessary legislative or other measures to establish as criminal offences, when committed intentionally, attempts to commit the offences established in accordance with this Convention."

Article 24(3)	"Each Party may reserve the right not to apply, in whole or in part, paragraph 2 to offences established in accordance with Article 20, paragraph 1.b, d, e and f, Article 21, paragraph 1.c, Article 22 and Article 23."
Article 27(1)	"Each Party shall take the necessary legislative or other measures to ensure that the offences established in accordance with this Convention are punishable by effective, proportionate and dissuasive sanctions, taking into account their seriousness. These sanctions shall include penalties involving deprivation of liberty which can give rise to extradition."
Article 28	"Each Party shall take the necessary legislative or other measures to ensure that the following circumstances . . . may . . . be taken into consideration as aggravating circumstances in the determination of the sanctions in relation to the offences established in accordance with this Convention: (a) the offence seriously damaged the physical or mental health of the victim; (b) the offence was preceded or accompanied by acts of torture or serious violence; (c) the offence was committed against a particularly vulnerable victim;"

Article 30(1)	"Each Party shall take the necessary legislative or other measures to ensure that investigations and criminal proceedings are carried out in the best interests and respecting the rights of the child."
Article 30(2)	"Each Party shall adopt a protective approach towards victims, ensuring that the investigations and criminal proceedings do not aggravate the trauma experienced by the child and that the criminal justice response is followed by assistance, where appropriate."
Article 31(1)	"Each Party shall take the necessary legislative or other measures to protect the rights and interests of victims . . . by: (g) providing for their safety . . . from intimidation, retaliation and repeat victimization;"
Article 38	"The Parties shall co-operate with each other, in accordance with the provisions of this Convention, and through the application of relevant applicable international and regional instruments, arrangements agreed on the basis of uniform or reciprocal legislation and internal laws, to the widest extent possible, for the purpose of: (a) preventing and combating sexual exploitation and sexual abuse of children;

	(b) protecting and providing assistance to victims; (c) investigations or proceedings concerning the offences established in accordance with this Convention."

The United Nations Declaration on the Elimination of Violence against Women

Provision	Excerpts from the Declaration on the Elimination of Violence against Women
Article 2	"Violence against women shall be understood to encompass, but not be limited to, the following: (a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation; (b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in

	educational institutions and elsewhere, trafficking in women and forced prostitution; (c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs."
Article 4	"States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination. States should pursue by all appropriate means and without delay a policy of eliminating violence against women and, to this end, should: (d) Develop penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence; women who are subjected to violence should be provided with access to the mechanisms of justice and, as provided for by national legislation, to just and effective remedies for the harm that they have suffered; (g) Work to ensure, to the maximum extent feasible in the light of their available resources and, where needed,

	within the framework of international cooperation, that women subjected to violence and, where appropriate, their children have specialized assistance, such as rehabilitation, assistance in child care and maintenance, treatment, counselling, and health and social services, facilities and programmes, as well as support structures, and should take all other appropriate measures to promote their safety and physical and psychological rehabilitation."

The United Nations 1959 Declaration on the Rights of the Child

Provision	Excerpts from the 1959 Declaration on the Rights of the Child
Preamble	"Whereas the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom, Whereas the United Nations has, in the Universal Declaration of Human Rights, proclaimed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as

	race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, Whereas the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth, Whereas the need for such special safeguards has been stated in the Geneva Declaration of the Rights of the Child of 1924, and recognized in the Universal Declaration of Human Rights and in the statutes of specialized agencies and international organizations concerned with the welfare of children, Whereas mankind owes to the child the best it has to give . . . ."
Principle 2	"The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration."
Principle 9	"The child shall be protected against all forms of neglect, cruelty and exploitation. He shall not be the subject of traffic, in any form. The child shall not be admitted to employment before an appropriate

	minimum age; he shall in no case be caused or permitted to engage in any occupation or employment which would prejudice his health or education, or interfere with his physical, mental or moral development."

The United Nations Universal Declaration of Human Rights

Provision	Excerpts from the Universal Declaration of Human Rights
Article 25(1)	"Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."
Article 25(2)	"Motherhood and childhood are entitled to special care and assistance . . . ."

The League of Nations 1924 Geneva Declaration of the Rights of the Child

Provision	Excerpts from the 1924 Geneva Declaration of the Rights of the Child
	"By the present Declaration of the Rights of the Child . . . men and women of all nations, recognizing that mankind owes to the Child the best that it has to give, declare and accept it as their duty that, beyond and above all considerations of race, nationality or creed: **(a)** The child must be given the means requisite for its normal development, both materially and spiritually; **(b)** The child that is hungry must be fed; the child that is sick must be nursed; the child that is backward must be helped; the delinquent child must be reclaimed; and the orphan and the waif must be sheltered and succored; **(c)** The child must be the first to receive relief in times of distress; **(d)** The child must be put in a position to earn a livelihood,

	and must be protected against every form of exploitation;"

RELEVANT EXCERPTS FROM FOREIGN LAWS

European Union Directive 2011/92/EU on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography, and Replacing Council Framework Decision 2004/68/JHA

Provision	Excerpts from Directive 2011/92/EU
Preamble (23)	"The use of seized and confiscated instrumentalities and the proceeds from the offences referred to in this Directive to support victims' assistance and protection should be encouraged."
Preamble (31)	"Member States should consider giving short and long term assistance to child victims. Any harm caused by the sexual abuse and sexual exploitation of a child is significant and should be addressed. Because of the nature of the harm caused by sexual abuse and sexual exploitation, such assistance should continue for as long as necessary for the child's physical and psychological recovery and may last into adulthood if necessary."
Preamble (32)	"Framework Decision 2001/220/JHA establishes a set of victims' rights in criminal proceedings, including the right to protection and compensation. In addition child victims of sexual abuse, sexual exploitation and child pornography should be given access to

	legal counselling and, in accordance with the role of victims in the relevant justice systems, to legal representation, including for the purpose of claiming compensation."
Article 18(1)	"Child victims of the offences referred to in Articles 3 to 7 shall be provided assistance, support and protection in accordance with Articles 19 and 20, taking into account the best interests of the child."
Article 18(2)	"Member States shall take the necessary measures to ensure that a child is provided with assistance and support as soon as the competent authorities have a reasonable-grounds indication for believing that a child might have been subject to any of the offences referred to in Articles 3 to 7."
Article 18(3)	"Member States shall ensure that, where the age of a person subject to any of the offences referred to in Articles 3 to 7 is uncertain and there are reasons to believe that the person is a child, that person is presumed to be a child in order to receive immediate access to assistance, support and protection in accordance with Articles 19 and 20."
Article 19(1)	"Member States shall take the necessary measures to ensure that assistance and support are provided to victims before, during and for an appropriate period of time after the conclusion of

	criminal proceedings in order to enable them to exercise the rights set out in Framework Decision 2001/220/JHA, and in this Directive. Member States shall, in particular, take the necessary steps to ensure protection for children who report cases of abuse within their family."

European Union Directive 2012/29/EU Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, and Replacing Council Framework Decision 2001/220/JHA

Provision	Excerpts from Directive 2012/29/EU
Preamble (5)	"The resolution of the European Parliament of 26 November 2009 on the elimination of violence against women called on the Member States to improve their national laws and policies to combat all forms of violence against women and to act in order to tackle the causes of violence against women, not least by employing preventative measures, and called on the Union to guarantee the right to assistance and support for all victims of violence."
Preamble (51)	"The Member State of the victim's residence should provide assistance, support and protection required for the victim's need to recover."

Article 8(1)	"Member States shall ensure that victims, in accordance with their needs, have access to confidential victim support services, free of charge, acting in the interests of the victims before, during and for an appropriate time after criminal proceedings."
Article 9(1)	"Victim support services, as referred to in Article 8(1), shall, as a minimum, provide: (a) information, advice and support relevant to the rights of victims including on accessing national compensation schemes for criminal injuries, and on their role in criminal proceedings including preparation for attendance at the trial; (b) information about or direct referral to any relevant specialist support services in place; (c) emotional and, where available, psychological support; (d) advice relating to financial and practical issues arising from the crime; (e) unless otherwise provided by other public or private services, advice relating to

	the risk and prevention of secondary and repeat victimisation, of intimidation and of retaliation."
Article 16(1)	"Member States shall ensure that, in the course of criminal proceedings, victims are entitled to obtain a decision on compensation by the offender, within a reasonable time, except where national law provides for such a decision to be made in other legal proceedings."
Article 16(2)	"Member States shall promote measures to encourage offenders to provide adequate compensation to victims."

The Dutch Criminal Code

Provision	**Excerpts from the Dutch Criminal Code**
Article 36f(1)	"By court ruling whereby a person is convicted for a criminal offence, that person may be obliged to pay the State a sum of money for the benefit of the victim. The State shall pay the amount received to the victim immediately."
Article 36f(2)	"The court may impose an order if and insofar as under civil law the suspect is liable towards the victim for the damage caused by the criminal offence."

Article 36f(3)	"The order may be imposed together with punishments and other orders."
Article 36f(4)	"Sections 24*a* and 24*b*, subsection one to and including four, are applicable mutatis mutandis, on the understanding that the increase of the amount due by virtue of the order shall be paid into the public funds of the State."
Article 36f(5)	"Payment by the convicted person to the State, shall in the first place go towards the payment of the order and subsequently for the increases pursuant to subsection four."
Article 36f(6)	"Sections 24c and 77l, subsection two to and including six, are applicable mutatis mutandis, on the understanding that the application of default detention or default juvenile detention does not take away the obligation pursuant to the order to pay damages to the victim."
3.1 Article 240b	"1. A term of imprisonment of not more than four years or a fine of the fifth category shall be imposed on any person who disseminates, offers, publicly displays, manufactures, imports, forwards, exports, acquires, or possesses an image – or a data carrier containing an image – of a sexual act in which a person who has apparently not yet attained the age of eighteen is involved or appears to be involved, or who gains access to such an image by means of a computerized

	device or system or through a communication service. 2. A term of imprisonment of not more than eight years or a fine of the fifth category shall be imposed on any person who commits any of the offences described in Section 1 by profession or custom."

AMICUS CURIAE BRIEF

No. 12-8561

In The Supreme Court of the United States

DOYLE RANDALL PAROLINE,

Petitioner,

v.

AMY UNKNOWN and UNITED STATES,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF ECPAT INTERNATIONAL AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICUS CURIAE*[1]

Amicus Curiae, ECPAT International is a global network of organizations in 75 countries dedicated to protecting children by coordinating research, advocating on children's behalf, and acting to end the commercial sexual exploitation of children, and ECPAT USA is an ECPAT International member organization, which focuses on the sexual exploitation of children in the United States and children impacted by American sex tourists traveling abroad (ECPAT International and ECPAT USA are hereinafter referred to as "ECPAT"). For the past 20 years, ECPAT has worked to stop the commercial sexual exploitation of children, including child prostitution, child pornography, child sex trafficking, and child sex tourism. ECPAT contends that the production, dissemination, or viewing of child pornography constitutes child abuse and violates the dignity and rights of aggrieved children. Further, research has shown an increasing link between the consumption of child pornography and child sexual abuse.

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[1] Pursuant to Supreme Court Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Supreme Court Rule 37.6, *Amicus Curiae* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

The international child rights community, which includes the United Nations and ECPAT, believes that any meaningful reduction in child pornography and child sex abuse requires criminalization of the intentional viewing and possession of child pornography. In prohibiting and punishing such activities, laws should protect all victims of sexually abusive and exploitative practices and ensure that law enforcement and judicial processes adopt child sensitive procedures. To provide a full and effective remedy for child sexual abuse victims, laws should also include procedures and remedies that address long-term injuries arising from such abuse, such as specialized psychological recovery and social reintegration services.

SUMMARY OF ARGUMENT

The rapid advancements in information and communication technology ("ICT") have led to an unprecedented expansion of the child pornography industry. Today, child pornography is easier than ever to produce, store, manipulate, reproduce, distribute, sort, and conceal. For example, internet-based ICT enables "grooming" – the process of preparing children for future sexual abuse – by providing platforms on which child sex abusers can meet children, send children pornography, and avoid detection. Yet, laws enacted to protect victims of child sexual exploitation have yet to catch up to the rapid growth of ICT.

While it may be tempting to view the prevalence of child pornography as an extraterritorial issue, the reality is that innumerable offenses are committed against children by residents of the United States both within the United States and while traveling outside the country. Moreover, the harm to children caused by child pornography is not limited to the actual victim (although, and without question, the victim suffers unforgettable harm); the act of viewing pornography harms children generally. A consumer of child pornography helps create a market and demand for new images or "representations" of child abuse, which, in turn, necessitates more abuse.

Victims of child pornography suffer proximate, immediate, and persistent harm; whether physical, psychological, or social; whether from the production, distribution, or possession of these materials. These children often require lifelong, specialized recovery and reintegration services because the child's recovery can be undermined by the continued existence of the pornographic materials online, forcing the victim to repeatedly confront the evidence of his or her abuse.

Unfortunately, these crucial rehabilitative services are expensive and unaffordable for many victims, despite their need. Public programs supporting recovery for victims exist in the United States, but are understandably expensive to maintain. Thus, the offenders, who are responsible for perpetuating the victim's suffering by producing, distributing, and possessing the illegal pornographic materials, should

be required to pay the restitution needed to make the victim physically, psychologically, and socially whole.

In fact, the right to restitution for victims of child sexual exploitation is well established in multiple international instruments. Notably, this right to restitution includes the right to sanctions against the victim's abuser(s). Given the United States' ability to influence legislation worldwide, and because child pornography is a multi-jurisdictional problem, the United States should comply with existing international legal standards.

Accordingly, this Court should rule in favor of Respondents, Amy Unknown and the United States, giving victims of child sexual exploitation in the United States a much needed – and deserved – right to restitution from their abuser(s).

ARGUMENT

I. SINCE THE EARLY 1990'S THERE HAVE BEEN RAPID, WORLD-WIDE ADVANCES IN TECHNOLOGY RESULTING IN AN UNPRECEDENTED PROLIFERATION OF CHILD SEX ABUSE MATERIALS

About 40% of the world's population is online with approximately 2.7 billion internet users. *See* THE WORLD IN 2013: ICT FACTS AND FIGURES 2 (Int'l Telecomm. Union ed., Feb. 2013) [hereinafter THE WORLD IN 2013], *available at* http://www.itu.int/en/ITU-D/Statistics/Documents/facts/ICTFactsFigures

2013.pdf. A substantial number of those users are children and young people. DEBORAH MUIR, VIOLENCE AGAINST CHILDREN IN CYBERSPACE 20 (ECPAT Int'l ed., 2005) [hereinafter CYBERSPACE], *available at* http://resources.ecpat.net/EI/Publications/ICT/Cyberspace_ENG.pdf. There are upwards of 245 million internet users in the United States alone and over 100 countries have at least one million internet users apiece. *See The World Factbook: Internet User Statistics*, CENTRAL INTELLIGENCE AGENCY (2009), https://www.cia.gov/library/publications/the-world-factbook/rankorder/2153rank.html. Manifestations of commercial sexual exploitation of children are prevalent in countries that have experienced rapid growth of unregulated and unmonitored ICT infrastructures. ECPAT INT'L, REGIONAL OVERVIEW ON CHILD SEXUAL ABUSE IMAGES THROUGH THE USE OF INFORMATION AND COMMUNICATION TECHNOLOGIES IN BELARUS, MOLDOVA, RUSSIA AND UKRAINE 19-20 (ECPAT Int'l ed., 2008) [hereinafter REGIONAL OVERVIEW], *available at* http://resources.ecpat.net/EI/publications/journals/regional_overview.pdf.

A. Recent Advances in Technology Make the Production, Distribution and Consumption of Child Pornography More Efficient, Permanent, and Difficult to Detect

The term "ICT" encompasses everything from mobile telephones to laptop computers to the method by which such devices operate and the systems that ensure they are connected. REGIONAL OVERVIEW at

19-20. The unchecked progress and breadth of ICTs has enabled the global economy to grow exponentially, ECPAT INT'L, THE USE OF INFORMATION AND COMMUNICATION TECHNOLOGIES IN CONNECTION WITH CASES OF CHILD-SEX TOURISM IN EAST AND SOUTHEAST ASIA 15-16 (ECPAT Int'l ed., 2010) [hereinafter SOUTHEAST ASIA], *available at* http://resources.ecpat.net/EI/publications/journals/ECPAT%20Journal_Mar2010_Final.pdf, but has also prompted an unprecedented expansion of the child pornography industry, CYBERSPACE at 20-21.

As in other areas of the law, the rapid progress of technology and its facilitation of the production, distribution, and consumption of child pornography vastly outpaces the enactment of laws that protect its victims. Many international treaties and laws within the United States, *see, e.g.*, United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter Convention]; Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography, May 25, 2000, 2171 U.N.T.S. 227 [hereinafter Optional Protocol], that protect the rights of children were conceived of and drafted long before the advent of the internet, personal computers, and other technology that are now a regular part of the daily lives of millions. In just the last few years, internet access and mobile telephones with internet and camera capabilities ("smartphones") have become ubiquitous, available globally and even in countries that are otherwise not technologically advanced or

economically affluent. SOUTHEAST ASIA at 19; *see also* Joanna Brenner, *Pew Internet: Mobile*, PEW ONLINE (Sept. 18, 2013), http://pewinternet.org/Commentary/2012/February/Pew-Internet-Mobile.aspx (56% of American adults own a smartphone, providing them with easy, mobile access to the internet). The speed and reliability of the networks used to connect these devices has also increased rapidly, particularly in less developed countries. *See* THE WORLD IN 2013 at 1.

Due to these rapid improvements in technology, child pornography is now easy to produce, store, manipulate, reproduce, distribute, and conceal. REGIONAL OVERVIEW at 20. Although the advent of ICTs has not necessarily created novel abuses or offenses against children, it has augmented the scale of those that currently exist. UNICEF INNOCENTI RESEARCH CTR., CHILD SAFETY ONLINE: GLOBAL CHALLENGES AND STRATEGIES 1 (UNICEF ed., 2012) [hereinafter CHILD SAFETY ONLINE], *available at* http://www.unicef-irc.org/publications/pdf/ict_techreport3_eng.pdf. The Department of Justice has noted a significant proliferation in child pornography aided by the rise of the internet. U.S. DEP'T OF JUSTICE, THE NATIONAL STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION: A REPORT TO CONGRESS 2 (U.S. Dep't of Justice ed., 2010) [hereinafter NATIONAL STRATEGY], *available at* http://www.justice.gov/psc/docs/execsummary.pdf.

"[C]yberspace is host to more than 1 million images of tens of thousands of children subjected to sexual abuse and exploitation." CYBERSPACE at 30

(citations omitted). In the United States, the National Center for Missing and Exploited Children ("NCMEC") has received more than 1.9 million reports of suspected child sexual exploitation and has analyzed more than 90 million images and videos depicting apparent child pornography. *Child Sexual Exploitation*, NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN, http://www.missingkids.com/exploitation (last updated June 2013). The Child Exploitation and Online Protection Centre ("CEOP") estimates that, in 2012 alone, approximately 50,000 individuals in the United Kingdom downloaded and shared indecent images of children. CHILD EXPLOITATION AND ONLINE PROT. CTR., THREAT ASSESSMENT OF CHILD SEXUAL EXPLOITATION AND ABUSE 8 (CEOP ed., 2013) [hereinafter THREAT ASSESSMENT], *available at* http://www.eop.police.uk/Documents/ceopdocs/CEOP_TACSEA2013_240613%20FINAL.pdf. The FBI estimates the existence of at least 40,000 public, internet chat rooms in which predators seek to meet and abuse children. MICHAEL SHIVELY ET AL., SURVEY OF PRACTITIONERS TO ASSESS THE LOCAL IMPACT OF TRANSNATIONAL CRIME, TASK ORDER: FINAL REPORT 14 (Abt Assocs. Inc. ed., 2003), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/217587.pdf. The FBI and the United Nations have estimated that 750,000 predators are connected to the internet at any given moment. Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, ¶ 34, U.N. Doc. A/HRC/12/23 (July 13, 2009) (by

Najat Maalla M'jid) [hereinafter *Promotion and Protection*].

As it proliferates, child pornography has become more extreme, portraying more violent subject matter and increasingly younger victims. NATIONAL STRATEGY at 2. A United States study found that "92 per cent of [sexual] offenders were in possession of images of minors that emphasized their sexuality or images of minors involved in explicit sexual activities; 80 per cent of the images depicted anal penetration of a child, including oral sex, and 21 per cent had child pornography material depicting violent scenes, including rape, bondage and torture of children." *Promotion and Protection* at 10.

Capturing representations of child pornography is easier to do and harder to detect than ever before, in no small part due to the proliferation of digital cameras, digital camcorders, and, most significantly, mobile telephones with camera functions. SOUTHEAST ASIA at 25. New devices come equipped with functions that make vacation photographs and video recordings of friends easy to share with others or post online to various social media websites. However, these same features make it easy to take, edit, and share images of child pornography with others more rapidly and efficiently than ever before. *Id.* at 25 n.35. The very concept of a "diminutive device[,]" which includes "pens, wristwatches, necklaces, [and] pendants, . . . " embedded with USB memory, allows its presence to remain unsuspicious, and its proximity to children to remain unalarming. *Id.* at 25.

Representations of child pornography are frequently recorded offline and distributed at a later time, but new technologies allow abusers to record contemporaneously the abuse of a child while broadcasting it to others as the acts occur. *See* THREAT ASSESSMENT at 8. An abuser can set up a webcam and coordinate with others, anywhere in the world, who are provided online access to see a child being abused in real time, often paying money to the abuser or trading images to obtain access to the live abuse. *See* CYBERSPACE at 34.

Thus, the lifespan of a single representation is vastly different than it was 20 years ago. When a representation is uploaded onto a child pornography forum, the original representation continues to exist on the creator's device, awaiting further dissemination on any number of networks. The copy that was uploaded on the forum can now be downloaded by any number of users. Each user obtains his own copy; each user can share that copy on other networks. There is no limit to the number of copies of a representation that can exist; no limit to the number of forums that can host and share a representation. CHILD SAFETY ONLINE at 1. In essence, this allows child pornography to reproduce like cancerous cells: innumerable copies of a single representation, each dividing and multiplying exponentially, spreading across the globe.

Certain ICT storage devices, such as USB and portable hard drives, allow abusers to house and cultivate even larger collections of child pornography

than previously possible, yet remain much more difficult to detect than in the past. KENNETH V. LANNING, CHILD MOLESTERS: A BEHAVIORAL ANALYSIS 80 (NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN ed., 5th ed. 2010) [hereinafter LANNING], *available at* http://www.missingkids.com/en_US/publications/NC70.pdf. It is not uncommon for police to discover, upon arrest of a child sex abuser, collections of literally hundreds of thousands of images. CYBERSPACE at 30. "It is possible to transfer an entire collection of digital libraries containing thousands of images through [USB storage devices]." SOUTHEAST ASIA at 25-26; LANNING at 80. Furthermore, the latest cloud-based technology (wherein media is stored on a remote server, not on the user's personal device, but is accessible by the user at any time) permits abusers to "keep" and access entire collections of child pornography without ever having to store them on their personal machines. *See* LANNING at 81.

The rapid pace of technological development results in an endless pursuit of abusers by those who strive to halt the unchecked flow of child pornography and abuse on the internet, including law enforcement agencies, ICTs, and other interested organizations. Efforts to filter child pornography or to prevent its access, to shut down abuser forums, or even to block individual abusers from a network, may be successful for a time, but are quickly circumvented by ever changing technology. *See* SOUTHEAST ASIA at 54.

Encryption technology, which allows abusers to disguise both their identities online as well as the

content of the representations they exchange, hinders efforts at detection and prosecution. *See, e.g.*, CYBERSPACE at 39-40.

B. New Technological Platforms Allow Child Sex Abusers to Easily Traffic Child Pornography, Access Children, and Communicate with Other Child Sex Abusers

The same breadth of websites, forums, social networks, and chat rooms that enables child sex abusers to share abusive representations and communicate with potential victims allows abusers to communicate with each other and form communities. *See, e.g.*, REGIONAL OVERVIEW at 31. Peer-to-peer ("P2P") networks are particularly favored, as they allow two users' devices to "communicate" with one another directly, instead of through a host server, thus making the exchange of information much more difficult to track. CYBERSPACE at 11 ("Peer-to-peer transmissions occur directly from one server to another without any tracking devices."); *id.* at 49 ("Peer-to-peer communication is also popular among people exchanging images of child abuse (such networks involve no host servers and it is very difficult to monitor traffic between sites)."). Researchers analyzing the largest P2P networks found over 1.8 million distinct users from over 100 countries sharing hundreds of thousands of files verified to be child pornography. RYAN HURLEY ET AL., MEASUREMENT AND ANALYSIS OF CHILD PORNOGRAPHY TRAFFICKING ON P2P NETWORKS 1 (Int'l World Wide Web Conference Comm.

ed., 2013), *available at* http://forensics.umass.edu/pubs/hurley.www.2013.pdf.

1. ICTs Can Expand Child Sex Abusers' Access to Child Pornography and Create a Market for Such Representations

Within these on-line communities, abusers "swap pornographic images [of children] the way children swap baseball cards." LANNING at 89. The exchange of representations provides the abusers with validation from those they consider their peers, reinforces their behavior, and provides a "common bond" with others. *Id.* Moreover, offenders may offer representations of abused children to gain access to other representations they do not yet possess, or even to gain access to a child with whom another party has contact. *Id.* at 91. In this way, these representations function as currency in the online sex abuse community; the more disturbing the act, the younger the child, or any other unusual characteristics, the greater the "value" of the representation. *See id.* As a result, the "market" necessitates further sexual victimization of children.[2] *See* Anthony Beech et al., *The Internet and*

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[2] In this case, Petitioner Paroline "accessed 280 child-porn images over 15 days between September 2007 and July 2008." Lee Hancock, *In Just a Few Clicks of Child Porn, Several Lives Are Ruined*, THE DALLAS MORNING NEWS, Nov. 28, 2010, *available at* http://www.dallasnews.com/news/state/headlines/20101128-In-just-a-few-clicks-of-5077.ece. During that same period, Paroline

(Continued on following page)

Child Sexual Offending: A Criminological Review, in 13 AGGRESSION AND VIOLENT BEHAVIOR 216, 222 (Elsevier Ltd. ed., 2008) [hereinafter CRIMINOLOGICAL REVIEW]; *R. v. Sharpe*, [2001] 1 S.C.R. 45, ¶ 92 (Can.).

2. ICTs Facilitate the Grooming of Children for Sexual Abuse

"Grooming" refers to the process of preparing a child for future sexual abuse.[3] Cyberspace and ICTs facilitate grooming in many ways, such as: providing numerous venues for abusers to meet children, simplicity of sending a child pornographic material, and ease of maintaining secrecy and avoiding detection by law enforcement agencies or the child's parents. *See* CYBERSPACE at 46. The process of grooming is not criminalized in every country, nor is it well-defined even in those countries in which it can be a crime. *See* SOUTHEAST ASIA at 48 (describing the criminalization of grooming in various jurisdictions).

Child sex abusers often expose children to pornographic representations involving both adults and other children as part of the grooming process, to

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began the process of adopting two toddler sisters, which adoption was almost final at the time of his arrest. *Id.*

[3] "Grooming has been defined as the process of 'befriending' a young person online 'to facilitate online sexual contact and/or a physical meeting with them with the goal of committing sexual abuse.'" CHILD SAFETY ONLINE at 15 (citing STEPHEN WEBSTER ET AL., SCOPING REPORT 7 (European Online Grooming Project ed., 2010), *available at* http://www.europeanonlinegroomingproject.com/wp-content/file-uploads/EOGP-Project-scoping-report.pdf).

prepare their victims for physical contact abuse. *See* CYBERSPACE at 13. "Pornography . . . is a tool for inducting and socialising children and young people into behaviours and outlooks that reflect the content of pornographic materials." *Id.* Representations of past victims of child abuse may be used to groom a new child for abuse, by normalizing the sexual acts of abuse in the mind of the target child. LANNING at 90 ("A child who is reluctant to engage in sexual activity with an adult or pose for sexually explicit photographs can sometimes be convinced by viewing other children having 'fun' participating in the activity."); *see also* CHILD SAFETY ONLINE at 15 (citing STEPHEN WEBSTER ET AL., SCOPING REPORT 13 (European Online Grooming Project ed., 2010), *available at* http://www.europeanonlinegroomingproject.com/wp-content/file-uploads/EOGP-Project-scoping-report.pdf)) (Offenders "typically use the 'success' of previous contacts with young people as a basis for adapting their activities.").

Outside of representations of child pornography, abusers are able to canvass sites popular among children in order to befriend them. Although these websites may have instructions or user policies aimed at preventing users under a certain age from accessing them, there is usually little practical impact of such policies, and rarely is there any verification of a user's age. *See* CYBERSPACE at 47-50. Social media sites such as Facebook or Twitter, purport to be "personal" (associated with a real person), but are instead easily exploited by abusers who pose as children or who simply befriend children as part of the grooming process. *See* CHILD SAFETY ONLINE at 2

(noting that research suggests that some abusers have up to 200 potential victims on their online "friends" list being groomed at any one time (citing STEPHEN WEBSTER ET AL., SCOPING REPORT 7 (European Online Grooming Project ed., 2010), *available at* http://www.europeanonlinegroomingproject.com/wp-content/file-uploads/EOGP-Project-scoping-report.pdf)). Usage of these sites has grown exponentially since their introduction. *See Number of Active Users at Facebook over the Years*, ASSOCIATED PRESS, May 1, 2013, *available at* http://news.yahoo.com/number-active-users-facebook-over-230449748.html (noting that Facebook had 1 million users at the end of 2004, and 1.11 billion users by March 2013); Catharine Smith, *Twitter User Statistics Show Stunning Growth*, THE HUFFINGTON POST, Mar. 14, 2011, http://www.huffingtonpost.com/2011/03/14/twitter-user-statistics_n_835581.html (noting an average daily sign-up rate of 460,000 new users).

Child sex abusers may pay or offer other rewards to gain access to live webcam footage of children performing sexual acts. Researchers, posing as prepubescent Filipina girls in 19 public chat rooms, found that 20,172 predators from 71 countries solicited the "girls" for sexual acts. TERRE DES HOMMES, WEBCAM CHILD SEX TOURISM: BECOMING SWEETIE: A NOVEL APPROACH TO STOPPING THE GLOBAL RISE OF WEBCAM CHILD SEX TOURISM 46-49 (Terre Des Hommes ed., 2013) [hereinafter BECOMING SWEETIE], *available at* http://www.terredeshommes.org/wp-content/uploads/2013/11/Webcam-child-sex-tourism-terre-des-hommes-NL-nov-2013.pdf.

In 2004, American and Belgian nationals were arrested for suspicion of running a website where customers paid $1.59 per minute to view webcam shows performed by children; the children were forced to work 8-hour shifts in front of the cameras and lived in captivity in "dens" financed by the suspects. *Id.* at 27.

3. ICTs Facilitate the Validation and Normalization of Abusive Behaviors

Expanded access to child sexual abuse representations through ICTs leads to increased viewing of such representations, which can augment the potential that subsequent offenses will be committed. Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, *Addendum: Mission to the United States of America*, ¶ 16, U.N. Doc. A/HRC/16/57/Add.5 (Feb. 7, 2011) (by Najat Maalla M'jid), *available at* http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A-HRC-16-57-Add5.pdf ("Possessing and distributing child pornography is considered a pathway to sexual assault."). For an abuser, viewing child pornography may serve as a means to normalize such behavior, which can lead to such individuals' inhibitions being weakened and the further abuse of children. *See* 1 S.C.R. ¶¶ 87-88 (summarizing and accepting the Crown's argument for banning possession of child pornography); *see also* Hilary Eldridge, *Patterns of Sex Offending and Strategies for Effective Assessment and Intervention*, *in* HOME TRUTHS ABOUT SEXUAL ABUSE: INFLUENCING

POLICY AND PRACTICE 313, 321 (Catherine Itzin ed., 2000).

Normalization can occur in different ways. By viewing others having sexual relations with children, individuals may develop cognitive distortions and see sexual relations with children as normal. *See* 1 S.C.R. ¶¶ 87-88 (summarizing and accepting the Crown's argument for banning possession of child pornography). Such cognitive distortions may also include the notion that children are cooperative or even enthusiastic, that they admire the offender or that the offender is in control. CRIMINOLOGICAL REVIEW at 222 (citing W.L. Marshall, *Revisiting the Use of Pornography by Sexual Offenders: Implications for Theory and Practice*, *in* 6 THE JOURNAL OF SEXUAL AGGRESSION 67, 72 (Whiting & Birch Ltd. eds., 2000)). Moreover, viewing child pornography may also fuel fantasies, which only adds to the likelihood that a subsequent contact offense may be initiated. 1 S.C.R. ¶ 89.

Further through these ICT child sex abuser communities, individuals may also find validation in their offensive behavior, which would further serve to normalize such acts. For example, the Usenet newsgroup, alt.support.boy-lovers, a forum for adult men to discuss their feelings toward boys, can provide a validation function for its users by having like individuals offering advice, support and encouragement to each other. *See* Keith F. Durkin, *Misuse of the Internet by Pedophiles: Implication for Law Enforcement and Probation Practice*, Fed. Prob. J., Sept. 1997, at 14, 15. Further, validation by such news

groups includes calling users "boy-lovers" rather than "perverts" or "child molesters." *Id.*

II. THE WORLD-WIDE TECHNOLOGICAL PROLIFERATION OF CHILD SEX ABUSE MATERIALS CAUSES HARM TO CHILDREN

Children who are victims of child pornography suffer immediate harm, whether physical or psychological or both. These children, many of whom are in the United States, or being exploited by United States citizens, often require lifelong, specialized recovery and reintegration services. Ethel Quayle, Clinical Psychology Professor, Univ. of Edinburgh Sch. of Health in Soc. Sci., Abuse Images of Children: Identifying Gaps in Our Knowledge 13 (April 6-7, 2009) (draft paper available at www.iprc.unc.edu/G8/Ethel_Quayle_3.6.09.doc) (draft paper for G8 Symposium held at the University of North Carolina on April 6-7, 2009). These crucial services are expensive and unaffordable for many of the victims.

A. Materials Depicting Child Sexual Abuse Cause Proximate, Immediate, and Persistent Harm to the Child Victim Well into Adulthood

The creation of child pornographic materials, in addition to their distribution and continued availability causes immediate physical harm to the child victim as well as lifelong psychological damage.

Often, the recovery from the persistent psychological and social harm requires years of therapy and continued care. This is because the child's recovery can be undermined by the continued existence of the pornographic materials online, forcing the victim to continuously confront the evidence of his or her abuse. In this sense, victims of child pornography suffer in ways that are unique compared to those who are subject to sexual abuse that ends at a certain point in time.

1. Proximate Harm from the Production of Child Pornography

In cases of sexual abuse resulting in the production of child pornography, the harm caused to the child victim is clear. First, there are the obvious physical effects of the sexual abuse involved in producing the child pornography. This may include injuries encountered during the abuse or as a result of the abuse, such as physical injuries following rape and assault, and contraction of HIV and other sexually transmitted diseases. Giulia Patane, *A Crucial Gap: Addressing the Physical and Psychological Consequences and Recovery of Child Victims of Commercial Sexual Exploitation*, *in* 7 EXAMINING NEGLECTED ELEMENTS IN COMBATING SEXUAL EXPLOITATION OF CHILDREN 32, 34 (ECPAT Int'l ed., 2013) [hereinafter *Crucial Gap*], *available at* http://ecpat.com/EI/Publications/Journals/ECPAT%20Journal_JUL_2013_ENG.pdf; Susan D. Hillis et al., *Adverse Childhood Experiences and Sexually Transmitted Diseases in Men and Women: A*

Retrospective Study, OFFICIAL J. OF THE AM. ACAD. OF PEDIATRICS, July 1, 2000, at e11, 5. This kind of abuse is typically not an isolated incident, but is repeated on a frequent basis, over a long period of time, and provides a steady income for the abusers, who can be organized criminals or the child's own family members. Often, children are also kept in captivity for long periods of time and repeatedly exploited. BECOMING SWEETIE at 12.

Second, the emotional and psychological effects on a child as a result of sexual abuse are well-known. Child sexual abuse has been found to alter a child's cognitive and emotional orientation to the world and causes trauma by distorting the child's self-concept and affective capacities due to traumatic sexualization, betrayal, powerlessness, and stigmatization. Delphine Collin-Vezina et al., *Lessons Learned from Child Sexual Abuse Research: Prevalence, Outcomes, and Preventative Strategies*, CHILD & ADOLESCENT PSYCHIATRY & MENTAL HEALTH, 7:22 (July 18, 2013), http://www.capmh.com/content/7/1/22; *see also* ETHEL QUAYLE ET AL., CHILD PORNOGRAPHY AND SEXUAL EXPLOITATION OF CHILDREN ONLINE 9, 44 (ECPAT Int'l ed., 2008) [hereinafter SEXUAL EXPLOITATION], *available at* http://lastradainternational.org/lsidocs/Child_Pornography_and_Sexual_Exploitation_of_Children_Online.pdf. Child sexual abuse has also been strongly linked to consequent post-traumatic stress disorder. Delphine Collin-Vezina & Martine Hebert, *Comparing Dissociation and PTSD in Sexually Abused School-Aged Girls*, 193 J. OF NERVOUS & MENTAL DISEASE 47, 47 (2005),

available at https://www.mcgill.ca/files/crcf/CollinVHebert2005.pdf, and dissociation systems, LESSONS LEARNED at 4.

Child sexual abuse is strongly associated with long term self-destructive coping mechanisms such as drug addiction, Dean G. Kilpatrick et al., *Risk Factors for Adolescent Substance Abuse and Dependence Data from a National Sample*, 68 J. OF CONSULTING & CLINICAL PSYCHOL. 19, 19 (2000), *available at* http://psycnet.apa.org/journals/ccp/68/1/19/; eating disorders, Lena Sanci et al., *Childhood Sexual Abuse and Eating Disorders in Females*, *in* 162 ARCHIVES OF PEDIATRICS & ADOLESCENT MED. 261 (Am. Med. Ass'n ed., 2008), *available at* http://archpedi.jamanetwork.com/issue.aspx?journalid=75&issueid=9200; *How Can Violence Against Children Be Prevented?*, WORLD HEALTH ORG. (May 2013), http://www.who.int/features/qa/44/en/; LESSONS LEARNED at 3; and suicide, J. Brezo et al., *Identifying Correlates of Suicide Attempts in Suicidal Ideators: A Population-Based Study*, 37 PSYCHOL. MED. J. 1551, 1551 (2007), *available at* http://www.ncbi.nlm.nih.gov/pubmed/17537281 (cited in LESSONS LEARNED at 4).

Preserving the sexual abuse through pornographic representations exacerbates and prolongs the harms experienced by the child victim, as:

> [T]he dissemination of those images compound the consequences of the child abuse, affecting the victims' recovery and the delivery of the services available to them. Images of sexually exploited children disseminated on

> the Internet will in fact never disappear and this has a devastating effect on victims. The victims do not want to tell; blame themselves; are even more traumatized; are ashamed to think that others might see the images on the Internet; are less likely to provide information; and need more time to recover from the abuse than if the images had not been recorded. Furthermore, many abusers force the victim to pretend that they are enjoying the experience, which is why a victim might fear that the police will believe that they welcomed the abuse.

Promotion and Protection at 11.

In addition, even where physical sexual abuse does not occur, forcing children to pose in sexually suggestive positions to create the pornographic materials also constitutes a form of sexual abuse that can lead to social and psychological issues. In recent research involving children forced to carry out webcam sex shows the children interviewed reported "feeling dirty, ashamed, and embarrassed, both during and after webcam sex performances" as well as "traumatic sexualization, a sense of betrayal, social stigmatization, and a sense of powerlessness." BECOMING SWEETIE at 29. The longer term effects included "low self-esteem and low feelings of self worth" as well as "self-destructive behavior, including alcohol and drug abuse." *Id.* Early sexualization of children can cause difficulties with socialization later in life. Children also suffer emotional trauma where they are manipulated into believing that they consented to the

production of the representations. Child victims fear "being thought to be complicit in the abuse or photography through the evidence of, for example, their smiling faces." Ethel Quayle, *The COPINE Project*, 5 IRISH PROBATION J. 65, 71 (2008), *available at* http://www.probation.ie/pws/websitepublishingdec09.nsf/AttachmentsByTitle/IPJ+2008+-+The+COPINE+Project,+ETHEL+QUAYLE/$FILE/2008+-+The+COPINE+Project,+"ETHEL+QUAYLE.pdf.

2. The Continued Long-Term Effects Due to the Distribution and Possession of Pornographic Materials

The harm caused to children who are the subject of pornographic materials does not end with the production of these materials. Indeed, the harm to the victims is "repeated at each reproduction of the image, which, in the case of . . . the internet, may have unlimited scope in time, space and quantities. Specific traumatic effects derive from the potentially millions of abuses suffered by the victim." *Crucial Gap* at 33. Distribution and the continued existence of the representations can compromise a child's ability to recover from the abuse. Because the representations continue to exist, the child victim lives in fear that: 1) s/he may encounter the representations at any time and thus have to relive the trauma; and 2) those who know her/him may encounter those representations at any point and recognize him or her, thus causing tremendous embarrassment or upset. SAVE THE CHILDREN EUROPE GRP., POSITION

PAPER REGARDING ONLINE IMAGES OF SEXUAL ABUSE AND OTHER INTERNET-RELATED SEXUAL EXPLOITATION OF CHILDREN 18 (Save the Children ed., 2005), *available at* http://resourcecentre.savethechildren.se/sites/default/files/documents/1782.pdf.

As described in Section I *infra*, the advancement of technology such as the use of P2P platforms and encrypted internet networks has allowed perpetrators to distribute and disseminate representations worldwide. Once they are created, the victim is powerless to remove these representations. This loss of control leads to continued and immediate psychological trauma due to the constant fear of being confronted with the memory of the sexual abuse. Because the representations online exist forever, a victim cannot know when he/she will encounter the representations again and will never know when the trauma of the sexual abuse is to be re-triggered. As a result, therapy, recovery, and reintegration services for these victims need to be constantly accessible. SEXUAL EXPLOITATION at 50-52.

In addition to the psychological trauma from the continued existence of the representations, the victim may also face continued social difficulty in engaging in society due to the proliferation of the pornographic materials. The victim must live in constant fear of the representations falling into the hands of those close to him/her, leading to humiliation and stigma related to the notion that the victim invited, caused or welcomed the abuse. One victim "talked of feeling fearful every time the mail arrived, overwhelmed with anxiety that

the photographs would be in the post and that her mother would see them." *Id.* at 49. Another has discussed a "psychological paralysis" that occurs due to the knowledge that the pornographic representations exist. *Id.* Such fear leads to continued psychological and social problems that require continued treatment and monitoring.

In fact, the Supreme Court of Canada in *R. v. L.M.*, [2008] 2 S.C.R. 163 recognized the severity and continuous nature of the harm of online child pornography, and the need to impose heavy penalties on offenders given the unique and long-term nature of this harm:

> I note that L.M. disseminated his pornography around the world over the Internet. The use of this medium can have serious consequences for a victim. Once a photograph has been posted on the Web, it can be accessed indefinitely, from anywhere in the world. R.M. will never know whether a pornographic photograph or video in which she appears might not resurface someday.

Id. ¶ 28 (L.M. was convicted of sexually assaulting his daughter and making, distributing and possessing child pornography. The Canadian Supreme Court upheld the trial judge's imposition of the maximum 15-year sentence, overruling the Court of Appeal's ruling to reduce the sentence to 9 years.).

It is important to note that the victim need not know the individual distributing and viewing the

representations of his/her abuse to be harmed. Even when the perpetrator is a complete stranger, the act of disseminating or possessing the pornographic material in and of itself prolongs the psychological and social harm suffered by the victim. By distributing the representations on the internet or otherwise, the offender extends the life of the representations. This leads to the victim living in constant fear that others, especially individuals who know the victim, may come into contact with the representations at any time. *See* SWEDISH CHILDREN'S WELFARE FOUND., CHILD AND YOUNG PERSONS WITH ABUSIVE AND VIOLENT EXPERIENCES CONNECTED TO CYBERSPACE 39-40 (Swedish Children's Welfare Found. ed., 2006), *available at* http://www.childcentre.info/projects/internet/dbaFile15616.pdf.

III. VICTIMS OF CHILD PORNOGRAPHY REQUIRE LIFELONG, SPECIALIZED RECOVERY AND REINTEGRATION SERVICES, WHICH ARE COSTLY

As addressed above, due to the proliferation of child pornographic representations on the internet where the representations are forever accessible, the victim's suffering is continuous. As a result, while the recovery and reintegration process to aid in the victim's healing will vary depending on the unique circumstances of each person, it is often a lifelong and costly endeavor. Typically, specialized recovery and reintegration services are necessary to address the victim's unique needs, requiring a holistic approach

which includes "physical, psychological and social recovery as well as his/her reintegration into a safe and protected environment." *Crucial Gap* at 32.

Recovery for victims can be divided into two phases: immediate intervention and long-term recovery. *Id.* at 36. Clearly, immediate attention must be paid to address any physical harms suffered by the child as a result of the abuse in producing the pornographic materials. This includes both the direct injuries from the sexual abuse encountered in producing the pornographic material as well as other health problems which arise indirectly related to the abuse. Full recovery by a victim, however, will require long-term care utilizing a holistic approach, including psychological, educational, and environmental support; and development of social skills. *Id.*

Psychological support is needed to help "undo" the damage to the victim, for example, through group therapy or counseling. In the case of child pornography victims, this therapy may last for years and may be required intermittently and repeatedly due to the fact that the proliferation of the pornographic materials will affect the victim for as long as the materials exist on the internet. Educational and environmental support is important to rehabilitate victims and integrate them into society. Further, victims often suffer from behavioral issues. For example, sexual abuse of a child often leads to children having misconceptions about sexual behavior and sexual morality. This can lead to a child's confusion about the role of sexual behavior, where children fail to identify potentially

risky situations and place themselves in positions of danger. ECPAT INT'L, THE PSYCHOSOCIAL REHABILITATION OF CHILDREN WHO HAVE BEEN COMMERCIALLY SEXUALLY EXPLOITED: A TRAINING GUIDE 23 (ECPAT Int'l ed., 2005), *available at* http://www.crin.org/BCN/Toolkit/Document/index.asp?infoID=22069&TKsubcatID=112&TKcatID=13. Such behavioral problems may take years to diagnose fully and rehabilitate, and require consistent services by social workers.

While programs supporting recovery for victims do exist in the United States, they are particularly expensive to maintain. These costs are due not only to personnel and material costs, but also to the fact that victims often require the use of these programs for an extended period of time, in some cases for many years, leading well into adulthood. *Crucial Gap* at 38. In the United States alone, the costs associated with child sexual abuse and exploitation are estimated to exceed $24 billion per year. SUZETTE FROMM, TOTAL ESTIMATED COST OF CHILD ABUSE AND NEGLECT IN THE UNITED STATES: STATISTICAL EVIDENCE 2 (Prevent Child Abuse Am. ed., 2001), *available at* www.preventchildabuse.org. Additionally, government and international organizations' resources are currently more focused on combating and preventing the abuses toward children, rather than supporting fully the efforts to recover and assist those who are already victims. *Crucial Gap* at 38.

The United Nations Human Rights Council's Special Rapporteur on the sale of children, child prostitution and child pornography, Najat Maalla M'jid, told ECPAT International:

> Child victims grow up knowing that those photographs or videos will be on the Internet for the rest of their lives, and each time they are accessed and viewed by another child sex abuser the child's rights are again violated. Relevant legislation should be clear and comprehensive and treat child pornography on the Internet as a grave violation of the rights of the child and as a criminal act, which means that the child should also have the right to restitution from the perpetrators.[4]

Thus, it is appropriate for the offenders, who perpetuate the victim's suffering by distributing and possessing the representations, to be required to pay for the costs of care needed to make the victim whole once again, physically, mentally, and socially.

IV. INTERNATIONAL LAW RECOGNIZES RESTITUTION TO VICTIMS OF CHILD SEXUAL ABUSE FOR THEIR LIFELONG SPECIALIZED RECOVERY AND REINTEGRATION SERVICES

Child pornography is globally recognized as an egregious human rights violation, with various international treaties and instruments devoted to addressing the sexual abuse and exploitation of children,

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[4] On November 15, 2013, the United Nations Human Rights Council's Special Rapporteur on the sale of children, child prostitution and child pornography, Najat Maalla M'jid, communicated this statement to ECPAT and authorized its inclusion in this brief.

including child pornography. Further, the right to restitution for victims of child pornography is well-established in several international instruments. Some of the primary international legal instruments that directly address child pornography include, but are not limited to, the following:

(i) the U.N. Convention on the Rights of the Child, which provides that children must be protected "from all forms of sexual exploitation and sexual abuse" including "the exploitative use of children in pornographic performances and materials," Convention at art. 34;

(ii) the Council of Europe Convention on Cybercrime, which advises each party to criminalize "procuring child pornography through a computer system for oneself or another person" and "[possession of] child pornography in a computer system or on a computer-data storage medium," Convention on Cybercrime, Council of Eur., art. 9, Nov. 23, 2001, E.T.S. No. 185;

(iii) the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, which advises each party to criminalize "procuring child pornography for oneself or for another person," "possessing child pornography" and "knowingly obtaining access, through information and communication technologies, to child pornography," Convention on Protection of

Children Against Sexual Exploitation and Sexual Abuse, Council of Eur., art. 14, Oct. 20, 2007, C.E.T.S. No. 201;

(iv) Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography and Replacing Council Framework Decision 2004/68/JHA ("Directive 2011/93/EU"), provides that "[s]exual abuse and sexual exploitation of children, including child pornography, constitute serious violations of fundamental rights, in particular of the rights of children to the protection and care necessary for their well-being" and minimum imprisonment terms for "acquisition or possession of child pornography," Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography and Replacing Council Framework Decision 2004/68/JHA, art. 5, 2011 O.J. (L 335/1) 2;

(v) International Labour Organization Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, which establishes child pornography as one of the "worst forms of child labour." Int'l Labour Org., *Worst Forms of Child Labour Convention*, at art. 3, No. 182

(June 17, 1999) (adopted by the Conference at its eighty-seventh session in Geneva); and

(vi) the 2005 U.N. Resolution Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (the "U.N. Guidelines"), which provides a framework for reviewing local laws to ensure full respect of child victims, assisting governments and other organizations in designing laws and policies on this issue, to guide professionals who work with children, and to assist caretakers of child victims. E.S.C. Res. 2005/20, U.N. Doc. E/RES/2005/20 (July 22, 2005) [hereinafter U.N. Guidelines].

Additionally, the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (the "Optional Protocol") mandates each party to ensure that child pornography is fully covered under criminal or penal law. Optional Protocol at art. 3, ¶ 1(c). Although this text only includes possessing child pornography for the purpose of producing, distributing, disseminating, importing, exporting, offering or selling, the Committee on the Rights of the Child providing guidance on this text has advised countries to prohibit simple possession as well. *See, e.g.*, United Nations Comm. on the Rights of the Child, Consideration of Reports Submitted by States Parties Under Article 12(1) of the Optional Protocol to the Convention on the Rights of the Child on the Sale

of Children, Child Prostitution and Child Pornography: Concluding Observations: Chile, ¶¶ 23-24, U.N. Doc. CRC/C/OPSC/CHL/CO/1 (Feb. 18, 2008), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/405/39/PDF/G0840539.pdf?OpenElement; United Nations Comm. on the Rights of the Child, Consideration of Reports Submitted by States Parties Under Article 12(1) of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography: Concluding Observations: Costa Rica, ¶ 24, U.N. Doc. CRC/C/OPSC/CRI/CO/1 (May 2, 2007), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/405/39/PDF/G0840539.pdf?OpenElement; United Nations Comm. on the Rights of the Child, Concluding Observations on the Initial Report of Uzbekistan Submitted Under Article 12 of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography, Adopted by the Committee at its Sixty-Third Session, ¶ 1, U.N. Doc. CRC/C/OPSC/UZB/CO/1 (June 14, 2013), *available at* http://www2.ohchr.org/english/bodies/crc/docs/co/CRC-C-OPSC-UZB-CO-1.pdf.

Of the above instruments, the Optional Protocol, Directive 2011/93/EU, and the U.N. Guidelines also expressly provide for a right to restitution for victims of child pornography. In addition to the above, the U.N. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and

Serious Violations of International Humanitarian Law (the "U.N. Basic Principles") detail the right to reparation for certain crime victims and specifically applies to the U.N. Convention on the Rights of the Child, which includes victims of child pornography. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, ¶ 27, U.N. Doc. A/RES/60/147 (Dec. 16, 2005) [hereinafter U.N. Basic Principles].

The U.N. Guidelines provide that victims of child pornography "should wherever possible, receive reparation in order to achieve full redress, reintegration and recovery" and that "reparation may include restitution from the offender ordered in the criminal court, aid from victim compensation programs administered by the State and damages ordered to be paid in civil proceedings. Where possible, costs of social and educational reintegration, medical treatment, mental health care and legal services should be addressed. Procedures should be instituted to ensure enforcement of reparation orders and payment of reparation before fines." U.N. Guidelines at art. 13, ¶¶ 35-37. Additionally, Directive 2011/93/EU on Combating Child Pornography provides that in addition to protection and compensation, victims of child pornography "should be given access to . . . legal representation, including for the purpose of claiming compensation." Directive 2011/93/EU ¶ 32. Further, the Optional Protocol mandates that parties shall

"take all feasible measures with the aim of ensuring all appropriate assistance to victims of such offenses, including their full social reintegration and their full physical and psychological recovery," Optional Protocol at art. 9, ¶ 3, and "ensure that all child victims of the offenses described in the present Protocol have access to adequate procedures to seek, without discrimination, compensation for damages from those legally responsible, *id.* at art. 9, ¶ 4.

Finally, the U.N. Basic Principles provide that victims of gross violations of international human rights law, including child pornography victims, have the right to a remedy that includes adequate, effective and prompt reparation for harm suffered, and that where a person is found liable for reparation to a victim, such party should provide reparation directly to the victim. Reparation includes "restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition." U.N. Basic Principles at art. 9, ¶ 18. The U.N. Basic Principles set out detailed requirements for compensation as follows:

> 20. Compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:

(a) Physical or mental harm;

(b) Lost opportunities, including employment, education and social benefits;

(c) Material damages and loss of earnings, including loss of earning potential;

(d) Moral damage;

(e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.

Obtaining compensation from the perpetrator, as opposed to the State, is also an important part of the right to reparation. The "satisfaction" component of the right to reparation includes "[j]udicial and administrative sanctions against persons liable for the violations." *Id.* at art. 9, ¶ 22(f).

Recognizing the imperative of safeguarding children's protection from all forms of violence and abuse, on-line and off-line, and acknowledging the opportunities and risks associated with children's access to and use of new information and communications technologies, the Special Representative of the United Nations' Secretary General on Violence against Children ("SRSG"), Marta Santos Pais, has identified this topic as a priority for her mandate. The SRSG told ECPAT International that

> The protection of children from abuse through representation or images in pornographic performances or materials is safeguarded by international law, including the Convention

> on the Rights of the Child and its Optional Protocol to the Convention on the Sale of Children, Child Prostitution and Child Pornography. Child pornography is a serious form of violence against children, including during its production and dissemination, and when it is subsequently viewed by potentially thousands of child sex abusers. The risk of abuse remains for a life time and may have a serious impact on countless other children. It is imperative that child victims are given the right to restitution for this crime. This is important as a remedy for children, and as a deterrent to prevent future situations of child sex abuse of this kind.[5]

CONCLUSION

As described above, the effects of child pornography on victims are profound and have a lasting impact. Having suffered at the hands of child sexual abusers, victims must be provided with the means to recover, heal, and integrate into society; indeed, it is society's duty to help victims of child abuse and pornography become whole again. As to who should pay for the cost of this recovery, undoubtedly, the cost should be borne by the perpetrators that caused or contributed to the harm. This is true whether the

[5] On November 15, 2013, the SRSG, Marta Santos Pais, communicated this statement to ECPAT and authorized its inclusion in this brief.

harm caused was direct, through physical sexual abuse, or indirect, through the repeated infliction of psychological trauma brought on by the distribution and possession of child pornographic representations.

For the reasons set forth herein as well as those submitted in Respondents' briefs, this Court should affirm the Fifth Circuit's ruling ordering restitution for Respondent Amy Unknown.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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QUESTION PRESENTED

What, if any, causal relationship or nexus between the defendant's conduct and the victim's harm or damages must the government or the victim establish in order to recover restitution under 18 U.S.C. § 2259?

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STATEMENT OF INTEREST[1]

Amici curiae are a bipartisan group of United States Senators who submit this brief in support of Amy Unknown. *Amici* include: Senator Orrin G. Hatch (R-UT); Senator Dianne Feinstein (D-CA); Senator Charles E. Grassley (R-IA); Senator Edward J. Markey (D-MA); Senator John McCain (R-AZ);

[1] The parties consented to the filing of this brief. Their letters of consent are on file with the Clerk. No party or counsel for a party authored this brief in whole or in part. No one other than *amici* or their counsel made a monetary contribution to fund the preparation or submission of this brief.

Senator Patty Murray (D-WA); and Senator Charles E. Schumer (D-NY).

Each of the *amici* served in the 103rd Congress and supported legislation containing the provision at issue in this case. In addition, all are deeply interested in ensuring that child-pornography victims like Amy receive the restitution to which they are entitled. *Amici* also have a fundamental and institutional interest in seeing Congress's enactments enforced as they are written.

SUMMARY OF ARGUMENT

Time and time again, this Court has emphasized that "in interpreting a statute a court should always turn first to one, cardinal canon before all others." *Connecticut Nat. Bank* v. *Germain*, 503 U.S. 249, 253 (1992). That cardinal rule is this: "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Id.* at 253–54. In Section 2259, Congress said that courts must order child-pornography defendants to pay restitution for "the full amount of the victim's losses." 18 U.S.C. § 2259(b)(1). Congress went on to say precisely what it meant by "the term 'full amount of the victim's losses,'" identifying six categories of costs for which restitution is required. *Id.* § 2259(b)(3). One of these categories, subsection (F), is limited to costs a victim incurs "as a proximate result" of the defendant's offense. *Id.* § 2259(b)(3)(F). The other five are not. *Id.* § 2259(b)(3)(A)–(E).

The Congress of the United States thus directly answered the question presented when it enacted Section 2259. Qualifying as a "victim" under the statute is the only causal nexus required to recover for the five categories of specific costs listed in subsections (A)–(E). The sixth subsection is a catch-all category, which includes an undefined and potentially unpredictable set of costs. For costs falling into that less predictable category only, Congress included an additional "proximate result"

constraint. The statute's meaning is plain, and it should be enforced as it was written.

Even apart from the plain text of Section 2259, the drafting history—which *amici* are uniquely poised to evaluate—makes clear that Congress really did mean what it said. For instance, the original draft of the Violence Against Women Act included parallel restitution provisions containing *two* express "proximate result" limitations among the categories of recoverable costs—one in the catch-all category, and another in one of the specific categories. *See* S. Rep. No. 101-545, at 4, 16–17 (1990). The latter limitation was deleted from the Act's restitution provisions prior to its passage. This fact, together with other aspects of the statute's evolution, confirms that Congress acted intentionally when it included proximate-cause requirements for some kinds of costs and omitted them for others. This Court should decline Petitioner's invitation to read in additional limitations on victims' recovery where Congress chose to leave them out.

Several well-established canons of statutory interpretation also support this clear-cut reading of Section 2259. Chief among these is the rule of the last antecedent, which provides that "a limiting clause or phrase * * * should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Barnhart* v. *Thomas*, 540 U.S. 20, 26 (2003). The canon's application here is straightforward: The "proximate result" limitation in subsection (F) cannot be read to cover the categories of losses described in subsections (A) through (E). The presumption against surplusage, the absurd-results canon, and the rule that remedial legislation should be read broadly all lead to the same conclusion.

Where the statute's plain text, its legislative history, and multiple canons of statutory interpretation all speak with one voice, the Court's job is not a difficult one. The Fifth Circuit decided this case correctly, and the Court should affirm.

ARGUMENT

I. CONGRESS INTENDED CHILD-PORNOGRAPHY VICTIMS TO RECOVER THE "FULL AMOUNT" OF THEIR LOSSES.

A. The Statute's Text Is Clear: The "Proximate Result" Requirement Applies Only To Subsection (F).

This case hinges on statutory language that could hardly be clearer. Section 2259 requires courts to order child-pornography defendants to pay restitution for "the full amount of the victim's losses." 18 U.S.C. § 2259(b)(1); *see id.* § 2259(b)(4)(A) ("The issuance of a restitution order under this section is mandatory."). The statute specifies that "the term 'victim' means the individual harmed as a result of a commission of a crime under this chapter." *Id.* § 2259(c). And it goes on to define "full amount of the victim's losses":

> [T]he term 'full amount of the victim's losses' includes any costs incurred by the victim for—
>
> (A) medical services relating to physical, psychiatric or psychological care;
>
> (B) physical and occupational therapy or rehabilitation;
>
> (C) necessary transportation, temporary housing and child care expenses;
>
> (D) lost income;
>
> (E) attorneys' fees, as well as other costs incurred; and
>
> (F) any other losses suffered by the victim *as a proximate result of the offense.*

Id. § 2259(b)(3) (emphasis added).

Consistent with the statute's goal of compensating victims for the "full amount" of their losses, *id.* § 2259(b)(1), the first five categories of compensable

costs contain no additional nexus requirement, *see id.* § 2259(b)(3)(A)–(E). That is, once an individual establishes that she is a defendant's "victim," the court must order restitution for "any costs" incurred by that individual in those specific categories. *Id.* § 2259(b)(3).

For costs other than those falling within the five categories that Congress specifically enumerated, subsection (F) provides for restitution in more limited circumstances. Namely, restitution is required only when those "other losses," which could include a wide variety of costs, are the "proximate result of the offense." *Id.* § 2259(b)(3)(F).

That is the statute Congress wrote, and this Court need look no further than its plain language to decide this case. As the Fifth Circuit correctly concluded, one category of costs contains a "proximate result" requirement; the others require only that an individual qualify as a "victim." *See* In re *Amy Unknown*, 701 F.3d 749, 762 (5th Cir. 2012) (*en banc*).

B. The Drafting History Confirms What the Plain Text Says.

1. *The Violence Against Women Act Was Intended to Provide Generous Restitution to Victims Like Amy.*

Section 2259's drafting history "confirms that Congress intended the statute to mean exactly what its plain language says." *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 574 (1982). To begin with, looking at Section 2259 as part of a bigger picture gives a clear view of Congress's aims. *See Writz* v. *Local 153, Glass Bottle Blowers Ass'n*, 389 U.S. 463, 469 (1968) (emphasizing that courts should consider a statute's text "in light of the objectives Congress sought to achieve").

Section 2259 was enacted as part of the Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (codified in scattered sections of 16, 18,

and 42 U.S.C.), which itself was part of the larger Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796. The Violence Against Women Act was the country's first comprehensive response to rape, domestic violence, and other forms of violence against women. The Act's original author, then-Senator Joe Biden, described it as "the cornerstone of the movement to make the United States a safer place for women." *Violence Against Women: Victims of the System: Hearing on S.15 Before the S. Comm. on the Judiciary*, 102d Cong. 1, at 185 (Apr. 9, 1991).

Congress viewed mandatory restitution for domestic-violence and sex-crime victims as a key mechanism for achieving the Act's goals. Prior to the Act's passage, the reality was that "[a]ll too often, restitution to victims [was] not ordered by the courts," *id.* at 6 (Statement of Sen. Thurmond), and then-existing law did "not * * * provide for a means to make victims whole," H.R. Rep. No. 104-16, 4 (1995). The Act's restitution provisions were designed to fill that gap by "requir[ing] and expand[ing] victim restitution in sex crime cases." 136 Cong. Rec. 14,491 (June 19, 1990) (Statement of Sen. Wilson). To that end, Section 2259 and related restitution provisions were written broadly, *see, e.g.*, 18 U.S.C. § 2259(b)(1) (directing restitution for "the *full amount* of the victim's losses" (emphasis added)), and made mandatory, *see, e.g.*, *id.* § 2259(b)(4)(A). The goal was to provide "powerful protection and assistance" to the "[w]omen and children who are the innocent victims of domestic violence." 139 Cong. Rec. 1281 (Jan. 26, 1993) (Statement of Sen. Rockefeller). And according to Senator Biden, the Act was "the most victim-friendly bill [the Senate] ever passed." 140 Cong. Rec. 23,654 (Aug. 22, 1994).

2. *The Evolution of the Act's Restitution Provisions Makes Clear That Congress Did Not Intend To Impose A General Proximate-Cause Requirement.*

There is little guidance to be gleaned from the scant legislative history focusing directly on Section 2259. On the one hand, the Senate's Committee Report refers in passing to proximate causation. *See* S. Rep. No. 103-138, at 56 (1993) (noting that Section 2259 "requires sex offenders to pay costs incurred by victims as a proximate result of a sex crime."). On the other hand, the Report gives a broader description of the statute just three sentences later: Section 2259, the Report provides, "requir[es] the court to order the defendant to pay the victim's expenses." *Id.* The Committee's brief discussion of Section 2259, accordingly, does not provide a clear indication of exactly how Congress intended causation requirements to apply to the enumerated categories of compensable losses.

Far more illuminating, however, is the drafting history of parallel restitution provisions in the Violence Against Women Act. The language Congress used in these parallel provisions evolved between the Act's early drafts and its final form. And tracing that evolution helps to clarify the intended scope of the "proximate result" limitation in Section 2259(b)(3)(F).

As originally drafted, the Violence Against Women Act contained multiple mechanisms for victim restitution. Although Section 2259 was not included in that first draft, two other restitution provisions were: 18 U.S.C. § 2248, which authorizes mandatory restitution for certain sex crimes, and 18 U.S.C. § 2264, which authorizes mandatory restitution for certain interstate domestic-violence crimes. *See* S. Rep. No. 101-545, at 4, 16–17 (1990). These two provisions developed in tandem, and in their final form they define "victim" and "the full amount of the victim's losses" in the same terms as Section 2259.

But it was not always so. As initially drafted, both Section 2248 and Section 2264 included *two* "proximate result" requirements among the categories of recoverable costs. Section 2248, for instance, defined the "full amount of the victim's losses" to include costs incurred for:

> (A) medical services relating to physical, psychiatric, or psychological care;
>
> (B) physical and occupational therapy or rehabilitation;
>
> (C) any income lost by the victim *as a proximate result of the offense*;
>
> (D) attorneys' fees; and
>
> (E) any other losses suffered by the victim *as a proximate result of the offense.*

Id. at 4 (emphases added). Section 2264's definition was nearly identical. *See id.* at 16–17.

The original version of these provisions demonstrates that when Congress intends to limit restitution to proximately caused losses, it says so explicitly. Indeed, if Section 2259 looked like the initial draft of these parallel restitution provisions, this case could never have arisen. The additional "proximate result" limitation in the lost-income category makes absolutely clear that Congress's "selective inclusion and omission of causal requirements" was intentional, In re *Amy Unknown*, 701 F.3d at 768, and that the "proximate result" language was intended to apply only within the specified subsections. Had Congress meant the "proximate result" requirement in the final subsection to attach implicitly to all of the other subsections, Congress would not have said it twice.

The proximate cause language was deleted from the lost-income provisions of Sections 2248 and 2264 before Section 2259 was added to the Act in 1993. *See* S. Rep. No. 102-197, at 4–5, 18–19 (1991). As a

result, Section 2259, which was modeled on the earlier restitution provisions, has always contained only one "proximate result" requirement. *See* S. Rep. No. 103-138, at 5–6 (1993). And that fact underscores the point: Between the Act's initial draft and its passage, Congress *eliminated* one of the two "proximate result" requirements in the Act's mandatory-restitution provisions. It beggars belief that Congress's decision to *delete* the "proximate result" language in the lost-income subsection was a *sub silentio* decision to *incorporate* proximate-cause principles into all of the subsections. Instead, as this Court has recognized, "[w]here Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." *Russello* v. *United States*, 464 U.S. 16, 23–24 (1983).

Also revealing is the evolution of the parallel restitution provisions' definition of "victim." As originally drafted, Sections 2248 and 2264 defined the term as "any person who has suffered *direct* physical, emotional, or pecuniary harm as a result of a commission of a crime under this chapter." S. Rep. No. 101-545, at 5, 17 (emphasis added). Between the Act's initial draft and its passage, the "directness" requirement was dropped. Accordingly, when the statute was enacted all three mandatory-restitution provisions defined "victim" more broadly as "the individual harmed as a result of a commission of a crime under this chapter." 18 U.S.C. §§ 2248(c), 2259(c), 2264(c).

The elimination of the "directness" requirement tracks Congress's decision to retain the "proximate result" limitation only in the catch-all category of losses. Especially taken together, these changes are strong evidence that Congress did not intend to impose a general proximate-cause limitation on victims' recovery.

3. *Congress Knew How To Impose A General Proximate-Cause Requirement When It Wished To.*

A comparison to a restitution provision that expressly imposes a general proximate-cause limitation makes all the more clear that Congress intended no such limitation in Section 2259. Again, the Violence Against Women Act was part of the larger Violent Crime Control and Law Enforcement Act. In that larger Act, Congress also included the Senior Citizens Against Marketing Scams Act of 1994, Pub. L. 103-332, 108 Stat. 2082, which contains its own mandatory-restitution provision, 18 U.S.C. § 2327.

Unlike the restitution provisions in the Violence Against Women Act, Section 2327 of the Senior Citizens Against Marketing Scams Act contains a straightforward, unambiguous proximate-cause limitation on restitution. In point of fact, it contains two such limitations. First, the statute defines the term "victim" in accordance with 18 U.S.C. § 3663A(a)(2), which specifies that a victim is "a person *directly and proximately* harmed as a result of the commission of an offense for which restitution may be ordered." *Id.* § 2327(c). And second, it defines the "full amount of the victim's losses" as "all losses suffered by the victim as a *proximate cause* of the offense." *Id.* § 2327(b)(3) (emphasis added).

Section 2327 demonstrates that Congress knew how to impose a general proximate-cause requirement when it wished to. If Congress wanted to imbue Section 2259 with such a requirement, it could have done precisely what it did in Section 2327. But in Section 2259 Congress made a different choice. Instead of including a general provision for restitution of all proximately caused losses, Congress made a detailed list of the kind of costs victims can recover. It carefully explained that some costs are recoverable in all circumstances while others are recoverable only with a showing of proximate cause. This Court should be especially hesitant to "assume

that Congress has omitted from its adopted text requirements that it nonetheless intends to apply * * * when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest." *Jama* v. *Immigration & Customs Enforcement*, 543 U.S. 335, 341 (2005).

II. CANONS OF STATUTORY INTERPRETATION CONFIRM THAT SUBSECTION (F)'S "PROXIMATE RESULT" REQUIREMENT APPLIES ONLY TO SUBSECTION (F).

1. Even if the language itself were not plain, and even if the drafting history were unclear, numerous canons of statutory interpretation confirm that the proximate-cause requirement only applies to subsection (F). First, the rule of the last antecedent provides that "a limiting clause or phrase * * * should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Barnhart*, 540 U.S. at 26. Also known as the rule of the nearest reasonable referent, *see* Antonin Scalia & Brian A. Garner, *Reading Law: The Interpretation of Legal Texts* 152 (2012), the canon is "the legal expression of a commonsense principle of grammar." *Id.* at 144.

This rule fits Section 2259 to a "T." "[A]s a proximate result of the offense" is a limiting phrase. Consistent with the rule of the last antecedent, as well as logic and grammar, that language modifies only the phrase it immediately follows, "any other losses suffered by the victim."

To be sure, "[l]ike all canons of interpretation, the rule of the last antecedent can be overcome by textual indication of contrary meaning." *Decker* v. *Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1343–44 (2013). In *Porto Rico Railway, Light & Power Co.* v. *Mor*, 253 U.S. 345 (1920), for example, the Court deviated from the rule where there were "special reasons" to construe limiting language to apply to both preceding phrases, *id.* at 348. The provision in question was a long sentence, separated only by commas, and uninterrupted by subsections. *See id.*

at 346–49. And the Court emphasized that its interpretation was necessary "to effectuate the general purpose of Congress" and avoid "assuredly unintended discrimination." *Id.* at 348–49.

But unlike the *Porto Rico* statute, Section 2259 contains nothing to justify tossing aside the rules of grammar and statutory interpretation. Quite to the contrary, Section 2259's structure makes clear that each subsection functions as a fully independent element. The provision opens with an introductory phrase ("[T]he term 'full amount of the victim's losses' includes any costs incurred by the victim for"), which is followed by elements that are individually lettered and separated by semicolons. Each of those elements completes the sentence the introductory phrase began. The bigger grammatical picture is thus entirely consistent: Each subsection is independent, and limiting language in one does not extend to the others. Moreover, unlike in *Porto Rico*, applying the rule to Section 2259 results in a reading that is more—not less—consistent with the statute's purpose because it provides fuller compensation for victims' losses.

2. Whereas the Fifth Circuit's construction of Section 2259 is consistent with grammar and established interpretative principles, Petitioner's construction runs afoul of a different canon of statutory interpretation—the presumption against surplusage. This long-standing rule provides that it is the Court's "duty to give effect, if possible, to every clause and word of a statute." *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) (quoting *United States* v. *Menasche*, 348 U.S. 528, 538–39 (1955)) (internal quotation marks omitted); *see also, e.g.*, *Washington Market Co.* v. *Hoffman*, 101 U.S. 112, 115 (1879) ("As early as in Bacon's Abridgment, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.' "). Construing the statute as Petitioner does would create not one, but two

different superfluities in Section 2259's definition of the "full amount of the victim's losses."

First, if Petitioner were correct that Section 2259 simply "incorporates the traditional requirement of proximate cause," *United States* v. *Monzel*, 641 F.3d 528, 536 (D.C. Cir. 2011), subsection (F)'s explicit "proximate result" requirement would be completely superfluous. That is, the statute would have precisely the same meaning if that phrase were not in the statute at all. Congress's words should not be reduced to redundancy where a reading that gives them logical effect is readily available.

Second, if Petitioner were right that subsection (F)'s "proximate result" requirement implicitly extends to subsections (A)–(E), those subsections themselves would be wholly redundant. If Congress had simply said what it said in subsection (F)—that "the term 'full amount of the victim's losses' includes any costs incurred by the victim for * * * any * * * losses suffered by the victim as a proximate result of the offense," 18 U.S.C. § 2259(b)(3)(F)—nothing more would have been necessary to cover the five specific categories losses Congress went out of its way to enumerate. In fact, that is essentially what Congress did in Section 2327. *See id.* § 2327(b)(3) ("the term 'full amount of the victim's losses' means all losses suffered by the victims as a proximate result of the offense."). This Court should decline to adopt a reading that deprives not just one, but *five* statutory subsections of independent meaning.

3. In addition to rendering much of Section 2259 surplusage, Petitioner's reading also produces absurd results. Against the backdrop of a statute designed to fully compensate sex-crime victims for their losses, Petitioner advances an interpretation of Section 2259 that would preclude restitution for child-pornography victims whose images have been widely trafficked. That is because, as the district court in this case noted, it is essentially impossible to determine among literally thousands and thousands

of criminals who should pay for what share of a victims' losses. *See United States* v. *Paroline*, 672 F. Supp. 2d 781, 792–93 (E.D. Tex. 2009). So under Petitioner's reading, a child-pornography victim whose image has been possessed by only one defendant might receive full restitution for her losses. But as a practical matter, a victim like Amy, whose images have been traded among thousands of individuals, could never be fully compensated for the losses she has suffered.

"[A]bsurd results," of course, "are to be avoided if alternative interpretations consistent with the legislative purpose are available." *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982). Such an alternative interpretation of Section 2259 is readily apparent. By simply adhering to its plain text, no absurdity results.

4. And there is yet another canon of interpretation that supports the Fifth Circuit's straightforward reading of Section 2259. This Court has endorsed "the canon of construction that remedial statutes should be liberally construed" so as to effectuate their compensatory purpose. *Peyton* v. *Rowe*, 391 U.S. 54, 65 (1968). And Section 2259 is just such a statute. Enacted to expand restitution for sex-crime victims like Amy, Section 2259 should be read broadly so as to fully achieve that purpose.

5. Finally, this Court should reject Petitioner's attempt to rely on the rule of lenity. *See* Pet. Br. at 39–43. For starters, the rule applies only to penal statutes—and Section 2259 is not one of them. *See, e.g.*, *United States* v. *Lanier*, 520 U.S. 259, 266 (1997) (referring to the rule of lenity as "the canon of strict construction of criminal statutes"). But more importantly, the "the rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute such that the Court must simply guess as to what Congress intended." *Barber* v. *Thomas*, 130 S. Ct. 2499, 2508–09 (2010) (internal citation and quotation marks omitted). Not so here.

What is plain from Section 2259's text is confirmed many times over in its "structure, history, and purpose." *Id.* Accordingly, even if the rule of lenity were relevant to this restitution statute, there is simply "no work for [it] to do." *Maracich* v. *Spears*, 133 S. Ct. 2191, 2209 (2013).

CONCLUSION

The Fifth Circuit's interpretation of Section 2259 is consistent with its plain text, its legislative history, and numerous canons of statutory interpretation. The Court should affirm.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

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In The
Supreme Court of the United States

DOYLE RANDALL PAROLINE,

Petitioner,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICUS CURIAE* MOTHERS AGAINST DRUNK DRIVING IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICUS*[1]

Mothers Against Drunk Driving ("MADD") is a national grassroots organization founded by the mother of a 13-year-old girl whose life was senselessly claimed by a drunk driver. In the more than 35 years since its founding, MADD staff and volunteers have fought for the rights of tens of thousands of families affected by the criminal acts of others.

While the emotional turmoil crime victims suffer is well chronicled, the staggering financial costs they bear is largely hidden from public view. Victims of drunk and impaired driving often incur lost wages, loss of support, funeral expenses, and expenses relating to past and future medical care.

Historically, courts have been reticent to impose these costs upon convicted offenders, electing instead to force innocent victims to bear the brunt of the costs resulting from criminal acts.

The federal restitution statutes at issue here represent much needed reform designed to shift the costs of crime back to responsible offenders. MADD and its members have fought hard for laws to strengthen restitution at the state and federal levels and the restitution statutes at issue are among the strongest.

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[1] This brief was not authored in whole or in part by counsel for any party. No party to the case or counsel for any party or any other person made a monetary contribution intended to fund the preparation or submission of the brief. The parties have filed blanket consents to the filing of *amicus* briefs.

Petitioner's broad attack on the federal restitution law threatens to undermine that progress and result in financial catastrophe for many thousands of victims and their families.

Like the many other dedicated organizations supporting Respondent, MADD recognizes the historical significance of this case – the first Supreme Court challenge ever to be initiated by a victim of crime whose rights were violated. This case therefore falls squarely within MADD's core mission of defending the rights of the victims it serves.

SUMMARY OF THE ARGUMENT

Restitution is an ancient precept long applied by civilizations across centuries and continents to force offenders to repay victims for the financial losses resulting from criminal acts. In addition to the statutory issues that are well covered in other briefs, Petitioner broadly attacks the restitution statute at issue as fundamentally and constitutionally unfair.

Restitution is neither a fine nor a windfall. Petitioner's suggestion that imposing restitution in this case is "unfair" turns that concept on its head. Restitution has long been about compensating innocent victims for financial losses caused by criminal acts. The large body of law underlying restitution is all about shifting a small portion of the staggering financial costs of crime from victims to criminal offenders.

Because restitution is aimed at compensating victims rather than punishing offenders, restitution orders simply are not subject to the limitations of the Eighth Amendment's Excessive Fines Clause. Moreover, even if that clause applied, restitution orders could not violate the clause under any circumstances because the orders are inherently proportional to the harm caused by a crime.

Lower federal courts and state courts alike have wrestled with whether the Eighth Amendment applies to restitution at all and, if so, what standard should govern. The *amicus curiae* urges the Court to clarify this issue by adopting the common sense notion, grounded in history as well as statutory and common law, that the Eighth Amendment's Excessive Fines Clause simply does not apply to restitution orders. In the alternative, to the extent the Court finds the clause applicable, MADD urges the Court to adopt the "grossly disproportionate" standard of review.

ARGUMENT

I. Restitution is About Compensating Victims – Not Punishing Offenders

The concept of restitution as a restorative remedy is found in ancient Arab, Greek, and Roman civilizations.[2] Throughout history, the concept of restitution has

[2] Douglas J. Sylvester, *Myth in Restorative Justice History*, 2003 UTAH L. REV. 471, 495-96 (2003).

been based on the notion that crime victims are entitled to compensation for the injuries they suffer.[3] Similarly, this Court has long recognized the purpose of restitution as "restoring someone to a position [she] occupied before a particular event" and that the primary consideration in awarding restitution as "the amount of loss sustained by the victim. . . ." *Hughey v. United States*, 495 U.S. 411, 416, 419 (1990).

The "amount" of financial loss sustained by crime victims is astounding. The United States Justice Department estimates that personal crime results in $105 billion annually in "tangible" losses (medical care, lost wages, etc.) and another $450 billion annually in intangible losses (pain and suffering, reduced quality of life, etc.).[4] The vast majority of these costs are not covered by insurance.[5]

In recent years, federal law has trended toward shifting more of the tangible costs of crime from innocent victims to the criminal offenders who caused the losses. Congress first introduced restitution for victims of federal crime in the 1925 Federal Probation Act, which permitted district courts to impose restitution

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[3] *Id.* at 500.

[4] Ted R. Miller, Mark A. Cohen, Brian Wiersma, *Victim Costs and Consequences: A New Look*, NAT. INSTI. JUST. RES. REP. 2 (1996).

[5] *The Economic Impact of Motor Vehicle Crashes 2000*, U.S. Dept. Transp. 7 (May 2002).

only as a condition of probation.[6] Congress passed the Victim Witness Protection Act ("VWPA") in 1982 rendering restitution as a separate component of sentencing.[7] In 1994, Congress passed 18 U.S.C. § 2259, giving child sex victims the right to mandatory restitution. Two years later, the Mandatory Victim Restitution Act ("MVRA") of 1996 was enacted; it required district courts to award restitution to a wide array of victims.[8] The key distinction between the MVRA and the VWPA is that the MVRA eliminated consideration of a defendant's ability to pay in determining the amount of restitution. *See United States v. Siegel*, 153 F.3d 1256, 1258 (11th Cir. 1998).The express purpose of the mandatory restitution statutes is "to restore a victim, to the extent money can do so, to the position [the victim] occupied before sustaining injury."[9]

II. Restitution Orders Cannot Constitute Excessive Fines under the Eighth Amendment

Petitioner urges the Court to adopt the position that awarding restitution to victims of child exploitation, such as Amy, constitutes a violation of the Eighth

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[6] Federal Probation Act of 1925, ch. 521, 43 Stat. 1259, 1259-60.

[7] Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, sec. 5(a), §§ 3579-80, 96 Stat. 1248, 1253-56.

[8] Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, §§ 204-05, 110 Stat. 1227, 1227-32.

[9] *United States v. Fair*, 699 F.3d 508, 512 (D.C. Cir. 2012).

Amendment's protection against excessive fines (the "Excessive Fines Clause"). The Eighth Amendment provides "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

Applying the Eighth Amendment as Petitioner suggests flies in the face of this Court's jurisprudence, which limits the Excessive Fines Clause of the Eighth Amendment to "only those fines directly imposed by, and payable to, the government." *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 268 (1989). As the Court has clarified, the Excessive Fines Clause "limits *the government's* power to extract payments, whether in cash or in kind, as punishment for some offense." *Austin v. United States*, 509 U.S. 602, 509-10 (1993) (emphasis supplied). Accordingly, the Excessive Fines Clause cannot apply to a restitution award unless the restitution order *both* constitutes a payment to the government *and* a punishment.

A. Restitution Orders Are Not Fines Because they are Payable to the Victim – Not the Government

Restitution cannot constitute an excessive fine because restitution orders are not "payable to" the government. Under the plain language of Section 2259, "the victim" is the beneficiary of the restitution

order.[10] This Court has repeatedly held that an award of damages in favor of a non-governmental person cannot constitute an excessive fine as a matter of law.[11]

B. Restitution Orders are Not Punishment within the Ambit of the Eighth Amendment

Even if Petitioner somehow establishes restitution orders as payments to the government (which he cannot), restitution simply cannot constitute a "punishment" as that term has been applied by the Court. *See Austin*, 509 U.S. at 610. That a restitution order is awarded in a criminal proceeding is not dispositive of whether it is a punishment. *See Austin*, 509 U.S. at 610 ("It is commonly understood that civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties.") Moreover, any punitive effects a restitution order has are simply byproducts of its financial impact on the defendant, rather than a goal of the order itself. *See*

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[10] *See generally* 18 U.S.C. § 2259.

[11] *See, e.g., Browning-Ferris*, 492 U.S. at 266 (holding punitive damages award in favor of private party cannot constitute an excessive fine because "the primary focus of the Eighth Amendment was the potential for governmental abuse of its 'prosecutorial' power, not concern with the extent or purposes of civil damages."); *Austin*, 509 U.S. at 622 (distinguishing forfeiture proceedings involving "payment to a sovereign" from other proceedings involving private persons).

Hudson v. United States, 522 U.S. 93, 101 (1997) ("[A]ll civil penalties have some deterrent effect.").

Despite their criminal context, restitution orders are significantly more remedial than punitive in nature. This is because restitution orders serve to compensate victims for the harms they suffer as the result of criminal wrongdoing; their goal is to restore victims to their original positions. *See Hughey*, 495 U.S. at 415; *see also Dolan v. United States*, 560 U.S. 605, 130 S. Ct. 2533, 2539 (2010) ("[T]he [Mandatory Victim Restitution Act] seeks primarily to assure that victims of a crime receive full restitution."). The compensatory goals of restitution are thus distinguishable from the traditional goals of criminal punishment: retribution and deterrence. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169 (1963) (setting forth the factors typically considered in determining whether a statute is "penal or regulatory in character").

While the Court has never addressed the issue, the courts of appeals disagree over whether restitution orders are punishments subject to the limitations of the Excessive Fines Clause of the Eighth Amendment. For example, the Ninth Circuit has held that "restitution under the MVRA is punishment" that implicates the Excessive Fines Clause. *United States v. Dubose*, 146 F.3d 1141, 1145 (9th Cir. 1998); *see also United States v. Bollin*, 264 F.3d 391, 419 (4th Cir. 2001) (applying the Eighth Amendment excessiveness analysis to a restitution award). Alternatively, the Fifth Circuit has held that it is "not persuaded that

restitution is a punishment subject to the same Eighth Amendment limits as criminal forfeiture. *In re Amy Unknown*, 701 F.3d 749, 771 (5th Cir. 2012); *see also Necula v. Conroy*, 13 Fed. App'x 24, 26 (2d Cir. 2001) ("[T]he monies owed were in the nature of restitution, not a fine. Therefore, the Eighth Amendment was not implicated."). To provide guidance and clarity to the courts of appeals, *amicus curiae* urges the Court to adopt the position that, based on great weight of evidence demonstrating restitution's restorative purpose, the Excessive Fines Clause simply cannot be implicated by a restitution order.

III. Restitution Orders Could Never be Found to Violate the Excessive Fines Clause Even if it Applied

Even if this Court applies the Excessive Fines Clause to restitution orders, the orders, by their very nature, could never meet the high standard required to constitute a cruel and unusual punishment under the Eighth Amendment. To violate the Excessive Fines Clause, a restitution order would have to be found to be grossly disproportionate to the crime itself. *See, e.g., Dubose*, 146 F.3d at 1145 ("Thus, we must determine whether the restitution orders imposed . . . are grossly disproportional to the crime committed."); *In re Amy Unknown*, 701 F.3d at 772 (explaining that the court's conclusion concerning proximate causation "does not open the door to grossly disproportionate restitution in a way that would violate the Eighth Amendment").

The gross disproportionality standard sets a very high bar. In *United States v. Bajakajian*, the Court explained that the "touchstone of the constitutional inquiry under the excessive fines clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." 524 U.S. 321, 334 (1998). In determining the appropriate excessiveness standard, the Court found two considerations particularly relevant: first, that "judgments about the appropriate punishment for an offense belong in the first instance to the legislature," and second, that "any judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise." *Bajakajian*, 524 U.S. at 336 (citing *Solem v. Helm*, 463 U.S. 277, 290, 288 (1993).

Because of the context in which restitution is imposed, restitution orders can never constitute "grossly disproportionate" fines. As discussed in Parts I and II.B, *supra*, the goal of restitution is to compensate crime victims and restore them to their original positions. Even though this Court has not considered the Eighth Amendment implications of restitution orders, both the restitution statutes themselves and this Court's interpretation of those statutes impose limits on the precise losses that may be awarded. *See Hughey*, 495 U.S. at 418-19 (construing the restitution provisions of the Victim and Witness Protection Act of 1982, the predecessor of the Mandatory Victim Restitution Act).

In light of these limitations, it is not surprising that, even among the courts of appeals that analyzed

restitution under the Excessive Fines Clause, *none* has found a restitution order unconstitutionally disproportional to the offense.[12] Rather, many of the courts of appeals have noted that because restitution orders are causally related to a victim's losses, they are inherently proportional. *See, e.g., Dubose*, 146 F.3d at 1145 ("Proportionality is inherent in a MVRA restitution order."); *Newell*, 658 F.3d at 35 ("[R]estitution is inherently proportional, insofar as the point of restitution is to restore the victim to the status *quo ante*."). Even in the context of conspiracies, the courts of appeals have upheld restitution orders that render a single co-conspirator jointly and severally liable for a victim's entire losses, even if that co-conspirator is responsible for only a discrete portion of those losses and even if restitution has not been ordered against all co-conspirators. *See, e.g., United States v. Arledge*, 553 F.3d 881, 899-900 (5th Cir. 2008); *see also United States v. Garcia-Castillo*, 127 Fed. App'x 385 (10th Cir. 2005) (upholding a restitution

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[12] *See United States v. Newell*, 658 F.3d 1, 35 (1st Cir. 2011); *United States v. Lessner*, 498 F.3d 185, 205-06 (3d Cir. 2011); *United States v. Newsome*, 322 F.3d 328, 342 (4th Cir. 2003); *United States v. Bollin*, 264 F.3d 391, 417-19 (4th Cir. 2001); *United States v. Arledge*, 553 F.3d 881, 899-900 (5th Cir. 2008); *United States v. Dighlawi*, 452 Fed. App'x 758, 760 (9th Cir. 2011); *Wright v. Riveland*, 219 F.3d 905, 915-19 (9th Cir. 2000); *United States v. Dubose*, 146 F.3d 1141, 1144-46 (9th Cir. 1998); *but see United States v. Boring*, 557 F.3d 707, 713-14 (6th Cir. 2009) (remanding for recalculation a restitution award that included payments to which the defendant was legitimately entitled because they did not constitute losses to the victim and were not properly the subject of restitution).

order applied jointly and severally to members of a conspiracy in the context of a Sixth Amendment challenge). Accordingly, as long as the statute authorizing restitution orders mandates that those orders are causally tied to a victim's losses, a restitution order can never be unconstitutional.

IV. A Supreme Court Decision on Whether Restitution Implicates the Eighth Amendment Will Have Far-Reaching Consequences.

This Court's decision here will have broad implications for victims of crime in every jurisdiction in this country. Each of the 50 states has its own statutory scheme for imposing criminal restitution.[13]

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[13] Ala. Code § 15-18-67 (2013); Alaska Stat. Ann. § 12.55.045 (West 2013); Ariz. Rev. Stat. Ann. §§ 13-804, 13-603 (2013); Ark. Code Ann. § 5-4-205 (West 2013); Cal. Penal Code § 1202.4 (West 2013); Colo. Rev. Stat. Ann. § 18-1.3-603 (West 2013); Conn. Gen. Stat. Ann. § 53a-28 (West 2013); Del. Code Ann. tit. 11 § 4106 (West 2013); Fla. Stat. Ann. § 775.089 (West 2013); Ga. Code Ann. § 17-14-3 (West 2013); Haw. Rev. Stat. § 706-646 (West 2013); Idaho Code Ann. §§ 19-5302, 19-5304 (West 2013); 730 Ill. Comp. Stat. Ann. 5/5-5-6 (West 2013); Ind. Code Ann. § 35-50-5-3 (West 2013); Iowa Code Ann. § 910.2 (West 2013); Kan. Stat. Ann. § 21-6604 (West 2013); Ky. Rev. Stat. Ann. § 532.032 (West 2013); La. Code Crim. Proc. Ann. Art. 833.2 (2013); Me. Rev. Stat. tit. 17-A § 1323 (2013); Md. Code Ann., Crim. Proc. § 11-603 (West 2013); Mass. Gen. Laws Ann. ch. 258B § 3 (West 2013); Mich. Comp. Laws Ann. § 780.766 (West 2013); Minn. Stat. Ann. § 611A.04 (West 2013); Miss. Code Ann. § 99-37-3 (West 2013); Mo. Ann. Stat. § 595.020 (West 2013); Mont. Code Ann. § 46-18-241 (West 2013); Neb. Rev. Stat. Ann. § 29-2281 (West 2013);

(Continued on following page)

The Excessive Fines Clause of the Eighth Amendment remains one of the only provisions of the Bill of Rights that has not been explicitly incorporated to the states by virtue of the Fourteenth Amendment Due Process Clause. *See McDonald v. City of Chicago, Ill.*, 130 S. Ct. 3020, 3035 n.13 (2010). However, many state courts have assumed Eighth Amendment incorporation and have considered the Court's Eighth Amendment holdings controlling for purposes of construing similarly worded state constitutional provisions.[14] Thus, even though the Excessive

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Nev. Rev. Stat. Ann. § 176.033 (West 2013); N.H. Rev. Stat. Ann. § 651:63 (2013); N.J. Stat. Ann. § 2C:43-3 (West 2013); N.M. Stat. Ann. § 31-17-1 (West 2013); N.Y. Penal Law § 60.27 (West 2013); N.C. Gen. Stat. Ann. § 15a-1340.34 (West 2013); N.D. Cent. Code Ann. § 54-23-4 (West 2013); Ohio Rev. Code Ann. §§ 2929.18, 2929.28 (West 2013); Okla. Stat. Ann. tit. 22 § 991f (West 2013); Or. Rev. Stat. Ann. § 137.106 (West 2013); 18 Pa. Cons. Stat. Ann. § 1106 (West 2013); R.I. Gen. Laws Ann. § 12-19-32 (West 2013); S.C. Code Ann. § 17-25-322 (2013); S.D. Codified Laws § 23A-28 (2013); Tenn. Code Ann. § 40-35-304 (West 2013); Tex. Code Crim. Proc. Ann. art. 42.037 (West 2013); Utah Code Ann. §§ 77-38a-301, 77-38a-302 (West 2013); Vt. Stat. Ann. tit. 13 § 7043 (West 2013); Va. Code Ann. § 19.2-305.1 (West 2013); Wash. Rev. Code Ann. § 9A.20.030 (West 2013); W. Va. Code Ann. § 61-11A-4 (West 2013); Wis. Stat. Ann. § 973.20 (West 2013); Wyo. Stat. Ann. § 7-9-102 (West 2013).

[14] *See, e.g., City of Milwaukee v. Arrieh*, 565 N.W.2d 291, 294 (Wis. App. 1997) ("Although the Supreme Court has never held that the Excessive Fines Clause applies to the States through the Fourteenth Amendment, we assume that it does . . Moreover, imposition of 'excessive fines' is prohibited by Article I, § 6 of the Wisconsin Constitution.") (citations omitted); *Pueblo Sch. Dist. No. 70 v. Toth*, 924 P.2d 1094, 1099 (Colo. App. 1996) ("Nevertheless, since the Supreme Court has assumed, without

(Continued on following page)

Fines Clause has not been explicitly incorporated, any ruling on its applicability to restitution orders stands to impact virtually every crime victim across the country.

Like the United States courts of appeals, state courts are divided on whether restitution orders implicate the Excessive Fines Clause. For example, the New Jersey Superior Court has held that "[a] fine for Eighth Amendment purposes is 'payment to a sovereign as punishment for some offense.' Restitution is paid to the victim, not the State. Also, restitution is not meant to punish but rather to rehabilitate the criminal." *State v. DeAngelis*, 747 A.2d 289, 295-96 (N.J. Super. Ct. App. Div. 2000) (quoting *Browning-Ferris*, 492 U.S. at 265, and *State v. Harris*, 362 A.2d 32, 35 (1976)); *see also Benton v. State*, 711 A.2d 792, 799 (Del. 1998) (holding that because restitution was "not a punitive fine at all" it could not be imposed in violation of the Eighth Amendment); *People v. Stafford*, 93 P.3d 572, 574 (Colo. Ct. App. 2004) ("[F]or purposes of Eighth Amendment Analysis, restitution

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deciding, that the excessive fines clause applies to the states, we also assume its applicability here."); *State v. Good*, 100 P.3d 644, 649 (Mont. 2004) ("Given that we interpret the wording of our state's Excessive Fines Clause in the same manner as the Excessive Fines Clause of the Eighth Amendment, however, we need not assume that the federal version has been incorporated, and therefore only address Good's state claim."); *State v. Izzolena*, 609 N.W.2d 541, 547 (Iowa 2000) ("The similarity between the two clauses permits us to look to the interpretations by the United States Supreme Court for guidance in interpreting our own clause.") (citation omitted).

is not the equivalent of a fine."). Alternatively, the Iowa Supreme Court has held that a restitution award "does not only serve a remedial purpose but also serves other purposes normally associated with punishment such as retribution and deterrence. The award is a 'fine' within the Eighth Amendment of the United States Constitution and article I section 17 of the Iowa Constitution." *Izzolena*, 609 N.W.2d at 549; *see also Good*, 100 P.3d at 649 (holding that restitution implicates the Excessive Fines Clause because it is "punitive in part").[15] In light of the influence of this Court's Excessive Fines Clause jurisprudence over state courts' analyses of restitution orders, even in the absence of a ruling on incorporation, a holding by the Court concerning whether the Excessive Fines Clause is implicated by a restitution order will help to eliminate this division. *Amicus curiae* urges the Court to reach the issue and definitely rule that restitution orders do not implicate the protections of the Eighth Amendment.

CONCLUSION

Discussions on federal restitution law often devolve into arcane and abstract analyses of technical

[15] Like the federal courts of appeals discussed in Section III *supra*, state courts that have analyzed restitution orders under the Excessive Fines Clause have consistently held that restitution orders are not unconstitutional based upon their inherent proportionality. *See, e.g., Good*, 100 P.3d at 650 (citing *Dubose*, 146 F.3d at 1145).

points of law. To MADD, and countless organizations like it, restitution comes down to a grieving mother seeking funds to bury her 13-year-old daughter from the now-convicted impaired driver who claimed the child's life. Nothing could be less abstract, less clear, or less ambiguous than that.

The changes to federal law that gave rise to this case are as hard-fought as they are carefully considered. More than anything else, this *amicus curiae* urges the Court to rule in a manner that preserves and protects those changes and applies long-standing principles of fairness and justice to clarify the manner in which those provisions should be applied to the countless human tragedies that will be directly impacted by this ruling.

Respectfully submitted,

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v.

UNITED STATES, *et al.*,

Respondents.

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To The United States Court Of Appeals
For The Fifth Circuit

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QUESTION PRESENTED

What, if any, causal relationship or nexus between the defendant's conduct and the victim's harm or damages must the government or the victim establish in order to recover restitution under 18 U.S.C. 2259?

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INTEREST OF *AMICUS CURIAE*[1]

The National Association to Protect Children (NAPC) is a national, non-profit pro-child, anti-crime membership association located in Knoxville, Tennessee. NAPC is founded on the belief that our first and most sacred obligation as parents, citizens, and members of the human species is the protection of children from harm. NAPC works with law enforcement agencies and prosecutors at the local, state and federal level to protect children. NAPC provides technical assistance, resources and analysis of crime victim laws. This case involves interests of crime victims who face a lifetime of exploitation from predators, because their images will circulate on the Internet forever and other children will be groomed with the same images for sexual exploitation.

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[1] No such counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission. The parties have filed blanket consent to the filing.

SUMMARY OF THE ARGUMENT

Victims of sexual abuse who know images exist of the abuse are in a unique category. Their victimization never ends because the evidence of the victimization lives on forever to fulfill the deviant sexual gratification of those that possess images of the sexual abuse[2]. These possessors fuel a global demand for the sexual abuse and perpetual exploitation of children. Once the images reach the Internet they remain accessible to others forever which causes a lifetime of trauma to the victim. Whether the victim fears a stranger has seen the images or knowing the images will be used to groom other victims, both cause irreparable harm.

Prior to the Internet, those who exchanged images of child sexual abuse used to hide in the shadows. Now they have multiplied exponentially and are out of the shadows. They openly and freely download images off the Internet and create a demand that results in the sexual abuse of thousands of children. Law enforcement attempt to stay ahead of the problem but there are simply too many engaged in these crimes. With the inability of law enforcement to stop this global problem victims are left tormented for the rest of their lives. Simply downloading one image of child sexual abuse fuels the torment and each downloader should pay joint and several liability.

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[2] We use the term child pornography and sexual abuse images interchangeably in this brief. The images possessed by possessors are crime scene images of sexual abuse so it is more appropriate to refer to the images as sexual abuse images or child sexual abuse images.

ARGUMENT

I. VICTIMS OF CHILD PORNOGRAPHY DESERVE FULL RESTITUTION FOR HARMS CREATED BY THE DEMAND FOR THEIR IMAGES AND THE FACT THAT THEIR IMAGES ARE USED TO GROOM ADDITIONAL CHILDREN FOR ABUSE IN PERPETUITY.

In 2008, USA Today reported that law enforcement identified 624,932 unique computers trafficking in images of child sexual abuse. Wendy Koch, *Software Tracks Child Porn Traffickers Online*, USA Today (Apr. 15, 2008), http://usatoday30.usatoday.com/news/nation/2008-04-15-childporn-side_N.htm. There is no way to know the number of victims of child sexual abuse images around the world but we do know that the National Center for Missing and Exploited Children "NCMEC" has identified 62 million images of child sexual abuse following seizure by law enforcement. U.S. Sentencing Comm'n, *Report to the Congress: Federal Child Pornography* (2012) (statement of Michelle Collins, Vice President, Exploited Children Division and Assistant to the president of NCMEC. While many of the images are duplicates that traffic the Internet, law enforcement has identified over 4,000 individual victims and thousands more remain unidentified. Id. at 4. During a 2005 study, investigators were interviewed and determined of those arrested for possession of child sexual abuse images 83% had images of children between 6 and 12, 39% had images of 3 to 5 year old children and 19% had images of toddlers or infants younger than 3. Janis Wolak, David Finkelhor and Kimberly J. Mitchell, *Child Pornography Possessors Arrested in*

Internet-Related Crimes: Findings From the National Juvenile Online Victimization Study, at 4 (2005). The images are extremely graphic as 92% had images focusing on the genitals or explicit sexual activity, 80% had images of sexual penetration of a child and 21% had images "depicting violence such as bondage, rape, or torture. Most of these involved images of children who were gagged, bound, blindfolded, or otherwise enduring sadistic acts." Id. at 5.

The Internet is truly the information revolution but it makes images of child sexual abuse readily available. It has expanded the market for possessors to obtain images of child sexual abuse and in turn that fuels greater demand for sexually abusive images of children. Prior to the Internet, images were traded face to face or through the mail. With the Internet there is a limitless audience one click away. This demand makes it more difficult for authorities to prevent the sexual exploitation and abuse. *See generally, United States v. Lewis*, 605 F.3d 395, 403 (6th Cir. 2010).

For most victims of crimes the harm is over following the act, but for children whose sexual abuse was recorded in images the sexual abuse is just the start of the crime. Victims, like Amy, spend the rest of their life carrying the fear of being recognized. Amy has attended therapy but her feelings are worse today because the crime has never gone away and she is forced to relive it on an almost daily basis. Amy indicated in her victim impact statement that it is "hard to describe what it feels like to know at any moment, anywhere, someone is looking at pictures of me as a little girl being abused by my uncle and is getting some kind of sick

enjoyment from it. It is like being abused over and over and over again." This knowledge that her sexual abuse images will be used to sexually abuse other children compounds her fear and embarrassment. Because of the pictures, "[w]hat happened to me hasn't gone away. It will never go away" *United States v. Kennedy*, 643 F.3d 1251, 1255 (9th Cir. 2011).

Amy is not alone, other victims have expressed the same views. The anonymous female from the Vicky series also writes of how she fears walking down the street. She said I "am living everyday with the horrible knowledge that someone somewhere is watching the most terrifying moments of my life and taking grotesque pleasure." Dennis Romboy, *Child Porn Victim Makes Gut-Wrenching Case for Restitution*, Deseret News, (Sept. 12, 2013), http://www.deseretnews.com/article/865586308/Child-porn-victim-makes-gut-wrenching-case-for-restitution.html?pg=all. She also feels that she is being raped all over again by those that have the evidence/images of her sexual exploitation.

However, the most heinous part of the continued abuse for the victims is to know the sexual abuse images may be used to groom future victims. Child sexual abuse images are used to groom new victims in a way to normalize the behavior. *Osborne v. Ohio*, 495 U.S. 103, 111 (1990). "I am horrified by the thought that other children will probably be abused because of my pictures. Will someone show my pictures to other kids . . . they tell them what to do? Will they see me and think it's okay for them to do the same thing?" *Victim Impact Statement of Girl in Misty Series*, The Virginian-Pilot (Oct. 25, 2009),

http://hamptonroads.com/2009/10/document-victim-impact-statement-girl-misty-series.

Competent courts have determined that there is significant restitution owed to the victims, but how much should the possessors of child sexual abuse images pay? The producers of the child pornography are motivated by the demand of the possessors. Specifically, in Amy's case, her abuser sexually violated her to produce child pornography for an end user. Then those images were traded or sold over the internet to countless possessors. Many times, images and videos are used to gain access to exclusive groups that require fresh, new content for admittance.

For example, federal agents that took down the online child pornography ring known as 'Dreamboard' found that there was a four-tiered hierarchy of users culminating with "Super VIPs." Super VIPs were producers and distributors of child pornography who were considered to be the trusted, upper echelon members. These members were encouraged to produce highly offensive, degrading and torturous images of abused children. According to the Justice Department, "the international group prized and encouraged the creation of new images and videos of child sexual abuse – numerous Dreamboard members sexually abused children, produced images and videos of the abuse, and shared the images and videos with other members of Dreamboard."[3] U.S. Dep't of Justice, *Attorney*

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[3] Equally disturbing were the rules of the website for the members. Among the rules (that which were printed in English, Russian, Japanese, and Spanish) were statements requiring that members "keep the girls under 13, in fact, I really need to see 12 or younger to know your [sic] a

General and DHS Secretary Announce largest U.S. Prosecution of International Criminal Network Organized to Sexually Exploit Children (Press Release, Aug. 11, 2011) ,http://www.justice.gov/opa/pr/2011/August/11-ag-1001.html. Thus, the demand for child pornography consistently and directly leads to victims' sexual abuse.

The behavior of those who engage in the production and possession of child sexual abuse images is what directly causes the emotional challenges for victims like Amy. Why should victims not receive restitution from every user in the stream of the exploitation? Why should any defendant not be held jointly and severally liable? The courts routinely hold that joint and several liability is the appropriate way for defendants to pay restitution. Thus, if the defendant wanted to seek contribution from other defendants, he or she could do so. We should not treat victims of child sexual exploitation any differently. The aggregate effect of the possessors and producers create the financial burdens associated with the restitution and should therefore pay that burden, not the victim. *See, United States v. Tzakis*, 736 F.2d 867 (2nd Cir. 1984).

Even if the harm from the abuse act subsides, the Internet has created a venue for the evidence of the

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brother." Furthermore, in a section of the website entitled 'Super Hardcore,' there were rules warning members to only upload the most heinous pictures and videos: "Its very young kids, getting fucked, and preteens in distress, and or crying ect... Getting hit hard on the ass, with a belt and so on . . I can't believe some of you guys can't work it out for yourselves? And 'pretend' bondage, 'Pretend light whipping' is not super hardcore. If the girl looks totall comfortable, she's not in distress, it does NOT belong I this section :-)"

crime to live for the remainder of the child's life. Possessors travel the Internet in hopes of finding the evidence of child sexual abuse or people willing to share the images. They don't seek out the evidence and images to rescue the child but instead view the exploitation for their own deviant sexual gratification. The continued existence and distribution of the crime scene images causes continued harm to the victims. This creates a distinct new harm that haunts the victim for the rest of their lives. *See generally, Osborne* at 111; *New York v. Ferber*, 458 U.S. 747, 759 (1982).

II. POSSESSORS AND DISTRIBUTORS OF CHILD ABUSE IMAGES REQUEST ACTUAL RAPE OF CHILDREN FUELED BY A GLOBAL DEMAND FOR THE SEXUAL ABUSE OF CHILDREN THAT RESULTS IN IMAGES OF THE ABUSE REMAINING ON THE INTERNET FOREVER.

One only needs to read the Dreamboard indictment to get an understanding of how broad this problem is internationally. Dreamboard was an Internet-based bulletin board that advertised child pornography. All members were encouraged to post images so the other members could have vast collections. The group contained different levels of membership. In order to increase your ability to access the site the member needed to "post more advertisements for child pornography, post advertisements for child pornography the member had produced, or post advertisements for child pornography that no other member possessed."

Superceding Indictment at 5-6, U.S. v. Barton, No. 5:11CR00062, (W.D.La. June 15, 2011). The Dreamboard indictment was the result of ICE Homeland Security Investigations' Opeation Delego. 72 were arrested for their participation in the international criminal network. U.S. Dep't of Justice, *Attorney General and DHS Secretary Announce largest U.S. Prosecution of International Criminal Network Organized to Sexually Exploit Children* (Press Release, Aug. 3, 2011), http://www.justice.gov/opa/pr/2011/August/11-ag-1001.html.

The Dreamboard indictment also showed the sophistication of possessors of child sexual abuse images on the Internet. It was difficult to track down many of the suspects because they did not use their real names. Instead they used aliases or screen names and encrypted the evidence and images of sexual exploitation. The members actually accessed the site using "proxy servers, which routed the Internet traffic through other computers." Id. One of the defendants, a police officer, accessed other's open wireless networks to avoid detection. Nate Morabito, *Former Kingsport Cop Used Neighbors, Churches, and Businesses to Access Child Porn,* Bristol Herald Courier (2012), http://m.tricities.com/news/article_66cb0a9b-e8eb-5c20-afcf-e26b75c9cc44.html?mode=jqm. This sophisticated stealth behavior disguised the user's identity and location. Dreamboard also encouraged members to encrypt files on their computer in the event officer's executed a search warrant on their computer.

Courts have recognized that "possessing these images and reviewing these images creates demand

– it fuels a cruel industry." *United States v. Christy*, 888 F. Supp.2d 1107, 1164 (D.N.M. 2012) (citation omitted). As the trial judge in the Seventh Circuit reasoned in sentencing Corey Stinefast, "his insatiable demand for such materials likely contributed to the production of other images involving the sexual exploitation of children." *United States v. Stinefast*, 724 F.3d 925, 933 (7th Cir. 2013). Other courts share similar views. A court in the Eighth Circuit noted that by "possessing, receiving, and distributing child pornography, defendants collectively create the demand that fuels the abusive images. *United States v. Fast*, 709 F.3d 712, 725 (8th Cir. 2013) (citing *In re Amy Unknown*, 701 F.3d 749, 762 (5th Cir. 2012)). The D.C. Circuit Court of Appeals held, "merely possessing child pornography is not a victimless crime, it fuels the demand for creation and distribution of child pornography." *United States v. Accardi*, 669 F.3d 340, 345 (D.C. Cir. 2012) (citing *United States v. Pugh*, 515 F.3d 915, 924 (9th Cir. 2008)).

Victims of child sexual exploitation are in a unique category. Most crimes end when the crime is over. Once an image of child sexual abuse is posted on the Internet it can remain there forever. For example, when you send an e-mail with an image attached the sender and the recipients have a copy. One of the recipients can also forward the file. Even if the files are deleted they remain on the digital media storage device. When you hit delete on your computer it simply makes the image unavailable to read but remains on your computer. A computer user with simple knowledge can access the deleted file.

Now imagine the image is posted on a website and not forwarded to others. Every one of the countless predators that view the image has the ability to download the file for their own deviant gratification. There is no way to know or find every image that is downloaded by a child pornographer. There are also websites that archive the Internet by making copies of the content of websites. *See generally, St. Luke's Cataract & Laser Inst., P.A. v. Sanderson*, 573 F.3d 1186 (11th Cir. 2009). These numerous methods to archive the images of child sexual abuse creates perpetual existence of the most tormented time of a child's life.

III. LAW ENFORCEMENT AGENCIES CONSTANTLY IMPROVE TECHNOLOGY TO CATCH CHILD PORNOGRAPHERS BUT ARE UNABLE TO STOP THE SPREAD OF THE CHILD ABUSE IMAGES ON THE GLOBAL MARKET.

Prior to the mainstream use of the Internet, child pornographers sent their child pornography in the mail or traveled with concealed packages of their material. The Internet created a global marketplace for those that exploit children. Federal courts only sentenced 90 child pornography offenders total in the combined stats of 1994 and 1995. U.S. Sentencing Comm'n, *Sex Offenses Against Children: Finding and Recommendations Regarding Federal Penalties* (1996). At the end of fiscal year 2012, the number of primary offenses for just possession of child pornography rose to 1,757. U.S Sentencing Comm'n *Sourcebook of Federal Sentencing Statistics*, Table 17 (2012).

In the days of mailing child pornography or face to face exchanges "child pornography was difficult to find, risky to produce, expensive to duplicate and required secure and private storage." Federal Sentencing Reporter, *Report to Congress: Federal Child Pornography Offenses*, Vol. 25. No. 5, (2013). The Internet now allows the immediate access to child sexual abuse images for anyone with a connection. Max Taylor & Ethel Quale, *Child Pornography: An Internet Crime*, 9 (2003). In 1997, the Census Bureau started asking whether someone in the house accessed the Internet. In 2011, 71.7% of the questioned households accessed the Internet compared to 18% in 1997. Thom File, *Computer and Internet Use in the United States*, (2013), http://www.census.gov/prod/2013pubs/p20-569.pdf. When comparing the rise of households with the Internet to the Federal prosecution, we see the Internet facilitated the increase of the global demand for child pornography.

In 1998, the first Internet Crimes Against Children Task Forces were founded to combat Internet predators. U.S. Dep't of Justice, *The National Strategy for Child Exploitation Prevention And Interdiction: A Report to Congress* (2010).

Under the technological and investigative direction of the Internet Crimes Against Children Task Force and the Wyoming Attorney General, technology was created to identify computers trafficking in child sexual abuse images. The advanced mapping technology showed us the magnitude of this problem. In April 2008, Operation Fairplay identified approximately 624,000 computers possessing child sexual abuse images, just in the United States. *Challenges and Solutions for*

Protecting our Children from Violence and Exploitation in the 21st Century: Hearing Before the S. Comm. On the Judiciary Sub. Comm. On Crime and Drugs, 110th Cong., (2008) (statement of Flint Waters, Lead Agent, Wyoming Internet Crimes Against Children Task Force). The same officer testified to a Congressional Committee a year earlier that the impact on these predators is "catastrophic" as the scale of the problem "has caused the investigative and forensic infrastructure to be overwhelmed." *Child Sex Crimes on the Internet: Hearing Before the H. Comm. On the Judiciary*, 109th Cong. (2007) (statement of Flint Waters, Special Agent, Wyoming Attorney General Division of Criminal Investigation). With over 624,000 computers possessing child sexual abuse images, law enforcement does not have the resources to go after each possessor.

Following Operation Fairplay, multiple other software systems were created and deployed to try to follow the traffic of those possessing child sexual abuse images. Officers needed to change the technology because offenders continue to conceal their activity in efforts to avoid being detected. The offenders "harness various technologies to evade law enforcement detection and to lesson the likelihood of successful prosecution if caught." U.S. Sentencing Comm'n, *Report to the Congress: Federal Child Pornography Offenses,* at 56 (2012). Some may simply log onto a wireless network at a coffee shop or library to avoid detection, but the more savvy possessors may use encryption and remotely access other's computers to download child sexual abuse images. There are still more tools that help possessors hide their identity. Online currencies and

pre-paid credit cards allow them to travel the Internet anonymously.

If the Internet did not create enough challenges for law enforcement, the increased use of smartphones with Internet connectivity further complicates the problem. Aaron Smith, *46% of Amerian Adults are Smartphone Owners*, at 2 (2012), http://pewinternet.org/~/media/Files/Reprots/2012/Smartphone%20ownership%201012.pdf. This technology allows those that seek images of child sexual abuse to access the images anywhere at anytime. The problem can best be summed up by Eric Diez, "in an ever-evolving technological world, government bureaucracy and legislatures tend to be reactive to, and thus, two steps behind, net-savvy child pornographers." Eric R. Diez, *"One Click, You're Guilty": A Troubling Precedent for Internet Child Pornography and the Fourth Amendment*, 55 Cath. U.L. Rev. 759, 786 (2006). Law enforcement simply does not have the resources to stop this global problem.

CONCLUSION

Courts agree possession of child sexual abuse images creates irreparable harm to victims. They also agree that the demand for the images fuels actual sexual abuse of children. Victims live with a lifetime of trauma because of the demand for their images. The demand is created by a market that is sophisticated and too large to stop. It is time for those possessing images of child sexual abuse to know that they will have to pay for the damage they create by their demand. Each and every person that seeks child sexual abuse images should jointly and severally pay for the harm their demand created.

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AMICUS CURIAE BRIEF

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DOYLE RANDALL PAROLINE, PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN AS AMICUS CURIAE IN SUPPORT OF RESPONDENT AMY UNKNOWN

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INTEREST OF AMICI[1]

The National Center for Missing and Exploited Children (NCMEC) was established in 1984 as a private, non-profit 26 U.S.C. 501(c)(3) organization and has been designated by Congress as "the official national resource center and information clearinghouse for missing and exploited children." 42 U.S.C. 5773(b)(1)(B).

[1] The parties have consented to the filing of amicus curiae briefs in support of either party or of neither party, in letters on file with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici curiae* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

NCMEC provides services to law enforcement, families, and the public that assist in the prevention of child abductions, the recovery of missing children, and the provision of services to combat child sexual exploitation. NCMEC receives a grant from the United States Department of Justice's Office of Juvenile Justice and Delinquency Prevention that enables it to perform 22 functions, several of which relate to online child pornography crimes. 42 U.S.C. 5773(b); E. Clay Shaw, Jr. Missing Children's Assistance Reauthorization Act of 2013, Pub. L. No. 113-38, 127 Stat. 527 (2013). NCMEC works with federal, state, local, and international law enforcement agencies, state missing children clearinghouses, and private corporations to further its programs of work. Because of these roles and functions, NCMEC is specially situated to comment on this case.

NCMEC serves as a central repository in the United States for information relating to child pornography reports. NCMEC's functions include operating specific programs to help stop the sexual exploitation of children, including: providing technical assistance and training to law enforcement agencies relating to child sexual exploitation cases; working with law enforcement, state educational agencies, child welfare agencies, and private sector industry leaders to reduce the proliferation of child pornography; operating a child victim identification program to assist in the identification of victims of child pornography; and operating the CyberTipline® reporting mechanism to which the public and electronic service providers can report apparent child sexual exploitation. See 42 U.S.C. 5773 *et seq.*; 18 U.S.C. 2258A; 18 U.S.C. 2258C.

NCMEC's expertise on the issue of child pornography stems from two of its core programs: the CyberTipline and the Child Victim Identification Program (CVIP). The CyberTipline serves as a national clearinghouse for tips and leads relating to child sexual exploitation. Launched in 1998, the CyberTipline is a mechanism for members of the public and electronic service providers to report instances of apparent child sexual exploitation, including online child pornography. 42 U.S.C. 5773(b)(1)(P). NCMEC processes each CyberTipline report and makes these reports available to law enforcement for their potential investigation and prosecution.

Since 1998, NCMEC has received more than 2,107,000 CyberTipline reports, of which more than 1,967,000 reports related to images of apparent child pornography. From January 1, 2013 through October 31, 2013, NCMEC received more than 420,000 CyberTipline reports, of which more than 409,000 related to child pornography. The number of reports received through the CyberTipline has grown steadily each year, from 223,374 to 326,310 to 415,650 in 2010, 2011, and 2012, respectively. NCMEC's analysis indicates that the number of images being collected and traded by offenders worldwide continues to expand exponentially, and these images include graphic and violent abuse and feature young children, including infants.

NCMEC also operates CVIP, which has a dual mission: (1) to provide information relevant to child pornography investigations; and (2) to assist in the identification of child victims depicted in pornographic images. 42 U.S.C. 5773(b)(1)(R). CVIP analysts review

copies of seized child pornography submitted by law enforcement to determine which image or video files include child victims who previously have been identified by law enforcement. NCMEC also utilizes its Child Recognition and Identification System (CRIS), a proprietary software program, to determine whether a file under review shows a previously identified child. If it appears a child in an image or video was previously identified by law enforcement, CRIS generates a Child Identification Report that includes information on the series[2] and contact information for the law enforcement agency that originally identified the child.

To date, CVIP analysts have conducted over thirty-nine thousand CRIS reviews, consisting of more than ninety-eight million image and video files. CRIS now contains information on approximately 5,278 child pornography victims identified by law enforcement. Based upon information reported to NCMEC, 92% of the child pornography series identified by law enforcement were produced in the United States, and 8% were produced outside the United States. Approximately 6% of identified children were infants or toddlers; 39% were prepubescent; and 55% were pubescent when the images were created. The files depict several types of sexually exploitative activity, including oral copulation (84%), anal and/or vaginal penetration (76%), use of foreign objects or sexual devices (52%), bondage and/or

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[2] Offenders often name a collection or "series" of child pornography images and/or videos taken of a single or multiple child victims over a period of time. A series typically includes pornographic and non-pornographic images of the child victim(s).

sado-masochism (44%), urination and/or defecation (20%), and bestiality (4%).[3]

In 2012 CVIP analysts conducted in excess of four thousand four hundred CRIS reviews comprising more than nineteen million images and videos. The number of images and videos reviewed by NCMEC has risen steadily each year, from 13,673,167 to 17,306,044 to 19,052,069 in 2010, 2011, and 2012, respectively, illustrating the growing task of monitoring the distribution of child pornography.

Because of NCMEC's unique role and experience relating to the issue of child pornography, NCMEC has testified before Congress and the United States Sentencing Commission regarding the proliferation of child pornography and the devastating effect that child pornography has on its victims. See Statement of Michelle Collins, Vice President, Exploited Children Division and Assistant to the President, NCMEC, Testimony before the United States Sentencing Commission (Feb. 15, 2012); Statement of Ernie Allen, President and CEO, NCMEC, Testimony before the House Committee on the Judiciary, The Protecting Children from Internet Pornographers Act (July 12, 2011).[4]

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[3] Percentages are from January 1, 2007 through December 31, 2011. The percentages do not sum to 100 because some series contain images depicting content in multiple categories.

[4] In the last five years, NCMEC was requested to testify twelve times before congressional committees on issues related to child pornography, sex trafficking, sex offenders, online safety, and missing children.

The resolution of the issue presented in this case—the interpretation of the proximate cause requirement in 18 U.S.C. 2259(b)(3), which provides for restitution to child pornography victims—will have a profound effect on the ability of child victims to receive monetary compensation for the trauma they have suffered. Because of its unique role, NCMEC has extensive knowledge regarding the problem of child pornography and a strong interest in a consistent interpretation of 18 U.S.C. 2259 to enable victims of child pornography to receive restitution.

SUMMARY OF THE ARGUMENT

As this Court and Congress have repeatedly recognized, child pornography presents a serious and growing threat to the children of this nation. Child pornography causes lifelong psychological, financial, and social harms to victims extending far beyond the harm inflicted during its creation. Individuals who possess child pornography violate and exploit their victims by viewing a record of the child's sexual abuse for personal gratification, thereby causing permanent injury to the victim. This problem is pervasive and has been growing steadily in recent years, making it increasingly important that victims of child pornography like Amy be able to recover restitution for the harm caused to them.

Victims of child pornography suffer an indivisible harm relative to the perpetrators, thus making recovery of losses based on proximate cause ineffective. Relying on proximate cause to apportion losses among the offenders would result in a victim never making a

full recovery because each offender would be able to claim his act alone did not cause the injury. Because the injury to victims of child pornography is indivisible, joint and several liability provides the most effective means to ensure that a victim is able to recover her or his full losses. A system that attempts to apportion liability among defendants across jurisdictions would result in disparate and uncertain recovery to the victim. Only joint and several liability fulfills Congress' intent to place the full cost of the losses on the shoulders of the perpetrators rather than on the victim.

ARGUMENT

I. CHILD PORNOGRAPHY CAUSES ITS VICTIMS INJURY THAT EXTENDS FAR BEYOND THE HARM INFLICTED DURING ITS CREATION

A. Child Pornography Has Been Recognized By Courts And By Congress As A Grave Threat To Children

This Court has consistently acknowledged the grave and continuing harms inflicted by child pornography. In the landmark case of *New York* v. *Ferber*, this Court recognized that "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." 458 U.S. 747, 757 (1982). Indeed, the Court noted several studies indicating that "[p]ornography poses an even greater threat to the child victim than does sexual abuse or prostitution." *Id.* at 760 (internal quotation omitted). The damage inflicted by child pornography extends far beyond the initial trauma of the sexual abuse suffered during its creation. "The pornography's continued existence causes the child victims continuing harm"; they are repeatedly exploited as images of them are disseminated and viewed, by an ever growing list of perpetrators. *Osborne* v. *Ohio*, 495 U.S. 103, 111 (1990). Because child pornography is "a permanent record of a child's abuse, [its] continued circulation * * * harm[s] the child who ha[s] participated. Like a defamatory statement, each new publication * * * cause[s] new injury to the child's reputation and emotional well-being." *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234, 249 (2002).

Congress likewise has recognized the pervasive harms of child pornography and has adopted a series of statutes directed at eradicating the interstate market for child pornography. See, *e.g.*, Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. 95-225, 92 Stat. 7 (1978) (codified as amended at 18 U.S.C. 2251 *et seq.*); Obscene Visual Representations of the Sexual Abuse of Children, 18 U.S.C. 1466A; Sexual Exploitation of Children, 18 U.S.C. 2251; Certain Activities Relating to Material Involving the Sexual Exploitation of Minors, 18 U.S.C. 2252 *et seq.*

The growth of the Internet and other technological innovations have greatly facilitated offenders' ability to store, distribute, and acquire child pornography. "[W]here children are used in its production, child pornography permanently records the victim's abuse, and its continued existence causes the victims of sexual abuse continuing harm by haunting those children in future years." S. Rep. No. 104-358, at 2, 104th Cong., 2d Sess. (1996); see also H.R. Conf. Rep. No. 104-863, at 28–29, 104th Cong., 2d Sess. (1996). See, *e.g.*, Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121, 110 Stat. 3009 (1996) (codified as amended at 18 U.S.C. 2251 *et seq.*) (making it illegal to persuade, induce, entice, or coerce a minor to engage in sexually explicit conduct for purposes of producing visual depictions of the conduct; setting fines and statutory minimums for offenders convicted of child pornography). In recognition of this problem, Congress strengthened the restitution remedies available to victims of federal crimes, including child pornography offenses. Mandatory Victim Restitution Act of 1996, Pub. L. No. 104-

132, § 201, 110 Stat. 1214, 1227 (1996) (codified as amended at 18 U.S.C. 3663A); see also 18 U.S.C. 2259.

In recent years, Congress has made explicit findings that child pornography harms the victim each time it is viewed. Not only the production, but also the "distribution, receipt, advertising and possession" of child pornography "is harmful to the physiological, emotional, and mental health of the children depicted in child pornography and has a substantial and detrimental effect on society as a whole." Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 501, 120 Stat. 587, 623 (2006). "Child pornography is a permanent record of a child's abuse and the distribution of child pornography images revictimizes the child each time the image is viewed." Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110-358, § 102, 122 Stat. 4001 (2008). Finally, Congress has enacted multiple pieces of legislation directly related to combating child pornography's increased technological sophistication. Protect Our Children Act of 2008, Pub. L. No. 110-401, 122 Stat 4229 (2008) (improving the Internet Crimes Against Children Task Force; increasing resources for regional computer forensic labs); E. Clay Shaw, Jr. Missing Children's Assistance Reauthorization Act of 2013, Pub. L. No. 113-38, 127 Stat. 527 (2013) (authorizing appropriations for NCMEC for FY2014-2018).

B. Despite Extensive Efforts To Combat It, Child Pornography Is Pervasive, And The Problem Is Growing

Despite efforts to stem its tide, child pornography remains a pervasive, and indeed growing, problem. The United States Sentencing Commission and the Department of Justice confirm that the quantity and severity of child pornography on the Internet has increased dramatically. See U.S. Sent'g Comm'n, *Federal Child Pornography Offenses* 5–6 (2012) (Sentencing Commission Report); U.S. Dep't of Justice, *The National Strategy for Child Exploitation Prevention and Interdiction: A Report to Congress* 9 (Aug. 2010), http://www.projectsafechildhood.gov/docs/natstrategyreport.pdf (DOJ Report).

This trend is dramatically illustrated by the sheer volume of files submitted by law enforcement to NCMEC in which Amy is pictured. In the first seven years that NCMEC reviewed files depicting Amy (November 26, 2002 to 2009), NCMEC processed more than 35,000 files in the series. In the four years from 2009 to 2013, this number has now doubled, to more than 70,000.[5] One reason for this dramatic increase is that child pornography is now a crime of international distribution. Sentencing Commission Report at vii. Images are transmitted to offenders around the world via the Internet; once distributed in this manner, it is

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[5] The number of image or video files pertaining to "Amy" represents separate instances in which her image or video files are seen and does not indicate the total number of unique or distinct files.

impossible to eradicate all copies. *Ibid.* International law enforcement, including agencies from Denmark, Germany, Canada, New Zealand, and Australia have disclosed to NCMEC that Amy's image and video files have been seen in their criminal investigations.

In recent years, the demand for child pornography files has found increasing outlets in technological advances, including the move to digital recording devices, more storage capacity, and faster Internet speeds. Sentencing Commission Report at 5. The ready availability of digital cameras (with no need for an outside developer), recording devices, and smart phones has facilitated the creation of new child pornography, while increased storage capacity and faster Internet speeds have permitted offenders to view and share larger numbers of photos and videos. *Id.* at 5, 42. In particular, the growing popularity of "peer-to-peer" file sharing, which permits direct, anonymous file-sharing between two or more users without cost to either user, has made distribution a common aspect of child pornography offenses. *Id.* at 5. It is estimated that 57% of global Internet traffic in 2011 was peer-to-peer traffic. *Id.* at 51.

Collectively, these technological changes have facilitated offenders' ability to create, possess, and distribute ever-larger volumes of child pornography. The U.S. Sentencing Commission has noted an "exponential" increase in the volume and ready accessibility of child pornography. Sentencing Commission Report at 6. Alarmingly, this increase includes graphic images involving very young victims, a genre of child pornography that previously was not known to be widely cir-

culated. *Ibid.* There also has been an increase in the distribution of images depicting violent, sadistic acts. U.S. Sentencing Commission data between 2002 and 2008 also show a 65% increase during that period for sentencing enhancements due to sadistic, masochistic, or violent images. DOJ Report at 22.

Reflecting this trend, federal prosecutions for child pornography offenses have also increased steadily in recent years, and U.S. attorneys prosecuted a total of 8,352 such cases between 2005 and 2009. DOJ Report at 11. The number of child pornography videos and images submitted to NCMEC in connection with the process of identifying the child victims concomitantly increased by 432% during this same period. *Ibid.*

Viewing of child pornography also directly harms additional victims by "driv[ing] a market for the production of new content and thus encourag[ing] production and direct exploitation and abuse." Michael C. Seto, *Internet Sex Offenders* 56 (2013). See also Sentencing Commission Report at vii. High demand for child pornography leads individuals to sexually abuse children and "commission" the abuse for profit or status. DOJ Report at 17.

The rising demand is often channeled through online communities of child pornographers. These online communities both desensitize offenders to the reprehensibility of their actions and encourage the participation of new individuals. Child Exploitation and Obscenity Unit, U.S. Dep't of Justice, Child Pornography, http://www.justice.gov/criminal/ceos/subjectareas/childporn.html (last visited on October 30, 2013) (DOJ

Website). Often, participation in these communities requires the victimization of additional child victims, because the communities "value the production of new child pornography images." Sentencing Commission Report at 96. There is evidence that offenders produce new images and videos in order to gain access. *Ibid.* In one investigation, the Federal Bureau of Investigation interviewed a man who admitted to molesting his daughter and videotaping the sometimes violent assaults. He told agents that he did this because he needed "fresh" images for other people on the Internet before they would trade their own newest images with him. His daughter was nine at the time and said her father began abusing her when she was five. DOJ Report at 18. One examination of three such communities found that there was a definitive hierarchy with "producers, posters of new materials, and prolific re-posters at the top of the pyramid." Sentencing Commission Report at 96. Thus, child pornography files are used as the coin in trade to rise in status within these communities, a process that often involves harm to additional child victims.

Even as it offers a community for offenders, the Internet also offers perceived anonymity. According to the Department of Justice, child pornographers were previously "lonely and hunted individuals because the purchasing and trading of such images was extremely risky"; today, however, the child pornography market has "exploded." DOJ Website. The Internet also permits distribution and communication across geographic boundaries, further expanding the market for child pornography as well as complicating law enforcement

action against offenders. Sentencing Commission Report 3.

Child pornography offenders span all professional, educational, and income levels. A 2000 study of law enforcement data funded by the Department of Justice showed that, while the majority of all individuals in the study who were arrested for possession of child pornography were white males over the age of twenty-five, their income and educational levels varied greatly. See Janis Wolak et al., *Child Pornography Possessors Arrested in Internet Related Crimes: Findings from the National Online Juvenile Victimization Study* 2-3 (2005) (the DOJ Study). A little over half of the offenders were single, divorced, or widowed (62%), while the remainder were married or living with a partner (38%). They were distributed fairly evenly among urban (22%), suburban/large town (41%), and small town/rural (33%) settings. *Ibid.* Forty percent of arrested possessors were "dual offenders" who both sexually victimized children and possessed child pornography, with both crimes discovered in the same investigation; an additional 15% were dual offenders who attempted to sexually victimize children by soliciting undercover investigators who posed online as minors. *Id.* at viii.

C. Offenders In Possession Of Child Pornography Cause Severe Harms To Victims

Victims of child pornography incur severe and lasting harms from the repeated viewing of their abuse by others for sexual gratification. Studies indicate that child victims are at a higher risk for depression, guilt, poor self-esteem, feelings of inferiority, interpersonal

problems, delinquency, substance abuse, suicidal thoughts, and post-traumatic stress disorders than other child sexual assault victims. Tink Palmer, *Behind the Screen: Children who are the Subjects of Abusive Images in Viewing Child Pornography on the Internet* 71 (Ethel Quayle & Max Taylor eds. 2005). Victims also frequently experience feelings of guilt and shame. Sentencing Commission Report 111. The feelings of guilt and shame can be so powerful that some victims deny the abuse even in the presence of photographic evidence. *Ibid.*

The symptoms of distress exhibited by child victims of sexual abuse continue from the actual sexual exploitation, through the time of disclosure, and into the post-disclosure phase. This psychological harm frequently extends into adulthood and impacts victims' ability to form healthy relationships with others. Sentencing Commission Report 113-114. In fact, one study of 100 victims interviewed about the effects of their abuse reported that "initial feelings of shame and anxiety did not fade but intensified to feelings of deep despair, worthlessness, and hopelessness." Richard Wortley & Stephen Smallbone, U.S. Dep't of Justice, Community Oriented Policy Services No. 41, *Child Pornography on the Internet* 15 (2012).

Child pornography victims are particularly injured by their inability to remove or control the images and videos of their sexual abuse. Studies have demonstrated that child victims experience intense feelings of powerlessness from knowing that there is nothing they can do to prevent others from viewing their pornographic images. See generally National Society for the

Prevention of Cruelty to Children, *Images of Abuse: A Review of the Evidence on Child Pornography* (2006). This harm is exacerbated by the fact that the Internet allows for wide circulation of abusive images and videos worldwide and precludes their permanent eradication. As Congress has recognized, "technological advances have had the unfortunate result of greatly increasing the interstate market in child pornography," Pub. L. No. 109-248, § 501, which in turn allows child pornography to be distributed to an ever growing audience of offenders.

A significant part of the healing process for children traumatized by sexual abuse is the ability to control when, how, and to whom to disclose their abusive experiences. See generally Ethel Quayle et al., *Child Pornography and Sexual Exploitation of Children Online* (2008). Children victimized through the distribution and possession of child pornography images are forever deprived of that capability. *Id.* at 50–51. The repeated uncontrolled distribution and possession of child pornography images online re-victimizes children and exposes them to further trauma and the attendant physical and mental repercussions. *Ibid.*

Child victims suffer a perpetual invasion of their privacy because it is impossible to ensure the removal of images and videos of the victim's abuse from an unknown offender's personal collection or from continued distribution on the Internet. DOJ Study at 27. The DOJ Study revealed that those who possess child pornography files add to the ongoing harm to child victims. *Ibid.* Indeed, each notification to a child victim that a new offender has been arrested for possessing images

of his or her abuse can further exacerbate a victim's psychological injuries. See Robert William Jacques, Note, *Amy and Vicky's Cause: Perils of the Federal Restitution Framework for Child Pornography Laws*, 45 Ga. L. Rev. 1167, 1193–1194 (2011).

The experiences of "Amy" and other child victims provide apt illustrations of the unique harms that are suffered by victims of child pornography and that Section 2259 seeks to redress. Amy's abuse began at the hands of her uncle when she was only four years old and was recorded in a set of images known as the "Misty" series. Between August 2002 and September 2013, NCMEC received over 4,900 submissions from law enforcement that included images or videos from the Misty series, most of which reported multiple images of Amy. These 4,900 reports contained a total of over 70,000 images of the Misty series that had been viewed, traded, and collected by offenders for their personal gratification. Law enforcement from all fifty states, Guam, Puerto Rico, international U.S. military basis, and Canada have submitted media including images from the Misty series. The Misty series contains still images of Amy being forced to perform a series of explicit sexual acts, including oral copulation, anal penetration, and masturbation. These images are crime scene photos memorializing the criminal acts committed upon Amy.

In her victim impact statements, Amy recounts how the harms inflicted by the abuse itself are perpetually multiplied by the continuous circulation of her images. In her words: "I am being exploited and used every day and every night somewhere in the world by

someone. How can I ever get over this when the crime that is happening to me will never end? How can I get over this when the shameful abuse I suffered is out there forever and being enjoyed by sick people?" Victim Impact Statement of Amy, the Victim in the Misty Series at 3, *United States* v. *Berk*, No. 08-cr-00212-GZS (D. Me. Oct. 16, 2009). Amy explained that this debilitating trauma and constant fear of being recognized have severely impacted virtually every aspect of her life, ranging from obtaining a driver's license to maintaining a job and building relationships with other people. *Id.* at 1–3.

"Vicky," a victim depicted in another widely circulated series of child pornography images, has attested to similar harms. In her victim impact statement, Vicky tells of chronic nightmares and panic attacks so severe that they forced her to leave college, stating "[e]very time [the images] are downloaded I am exploited again, my privacy is breached, and my life feels less and less safe. I will never be able to have control over who sees me raped as a child." Second Amended Motion for Victim Restitution, Exhibit Victim Impact Statement of Vicky at 1–2, *United States* v. *Ontiveros*, No. 2:08-cr-00081-JVB-APR-1 (N.D. Ind. Mar. 31, 2011). Certain viewers of Vicky's images even have sought to contact her directly, *id.* at 3–4, further illustrating the lasting harm caused by the proliferation of child pornography.

Another child victim, Masha Allen, testified before Congress that "because [the abuser] put my picture on the Internet, the abuse is still going on. Anyone can see them. People are still downloading them—we get

notices from the FBI every time someone is arrested for it." Sexual Exploitation of Children Over the Internet: What Parents, Kids, and Congress Need to Know About Child Predators: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce, 109th Cong. 442 (2006) (Statement of Masha Allen). The words of Amy, Vicky, and Masha are emblematic of the profound and lasting harms suffered by many victims of the child pornography escalation.

II. PETITIONER'S PROXIMATE CAUSE STANDARD FAILS TO ACKNOWLEDGE THE INDIVISIBLE NATURE OF THE HARM, AND WOULD BE ENTIRELY INEFFECTIVE FOR COMPENSATING VICTIMS

A. The Injury Caused By Child Pornography Is An Indivisible Harm

Amy's injury, as well as the injury of any other victim of child pornography, is an indivisible harm because it is not capable "of any logical, reasonable, or practical division." Restatement (Second) of Torts § 433A, comment i (1965). Rather, it is a single injury that would be impossible to divide "except upon a purely arbitrary basis for the purpose of accomplishing the result." *Ibid.* It would be arbitrary and illogical to claim that one defendant who possessed an image of Amy's abuse caused a certain amount of her injury, while another defendant caused a different amount. The Restatement (Second) of Torts provides that a "broken leg, or any single wound" is an example of an indivisible harm "since it is impossible, except upon a purely arbitrary basis for the

purpose of accomplishing the result, to say that one man has caused half of it and another the rest." *Ibid.* While substantially more debilitating than a broken leg, similar to this type of injury, Amy's injury is a single injury. That it is a long-term, multifaceted injury, not a short-term physical wound, makes no difference to this analysis.

That the harm is indivisible is further evidenced by the fact that victims describe the trauma as a whole, rather than referring to any individual perpetrator. Victims have commented that the trauma they suffer is "never ending," and they experience it "every[]day": "unlike other forms of exploitations, this one is never ending. Everyday [sic] people are trading and sharing videos of me as a little girl being raped in the most sadistic ways." Sentencing Commission Report at 113. Victims have reported "fear[ing] that strangers they see on the street have seen images of their abuse, and they are ashamed and embarrassed that a teacher, a potential date, or a stranger in public will recognize them." *Ibid.* As discussed above, see Section I.C., *supra*, Amy has explained that the constant fear of being recognized has severely impacted virtually every aspect of her life, ranging from obtaining a driver's license to maintaining a job and building relationships with other people. Victim Impact Statement of Amy the Victim in the Misty Series at 1–3, *United States* v. *Berk*, No. 08-cr-00212-GZS (D. Me. Oct. 16, 2009). Similarly, Vicky focuses on the fact that "[s]he will never be able to have control over who sees me raped as a child." Second Amended Motion for Victim Restitution, Exhibit Victim Impact Statement of Vicky at 1–2, *United*

States v. *Ontiveros*, No. 2:08-cr-00081-JVB-APR-1 (N.D. Ind. Mar. 31, 2011). Child victim Masha Allen testified before Congress that she was "more upset about the pictures on the Internet than [she was] about what [her abuser] did to [her] physically." See Statement of Masha Allen.

It is this generalized trauma—indivisibly resulting from the acts of each offender and their collective whole—that causes the harms suffered by victims of child pornography, including depression, guilt, poor self-esteem, feelings of inferiority, interpersonal problems, delinquency, substance abuse, suicidal thoughts, and post-traumatic stress disorders. Tink Palmer, *Behind the Screen: Children who are the Subjects of Abusive Images in Viewing Child Pornography on the Internet* 71 (Ethel Quayle & Max Taylor eds. 2005). Indeed, as child pornography images continue to circulate, many victims report that their initial feelings of shame and anxiety did not fade, but instead "intensified" to "deep despair, worthlessness, and hopelessness." Richard Wortley & Stephen Smallbone, U.S. Dep't of Justice, Community Oriented Policy Services No. 41, *Child Pornography on the Internet* 15 (2012).

B. Requiring A Victim To Determine Exactly What Part Of An Indivisible Injury Was Proximately Caused By Each Perpetrator Is Not Feasible And Would Result In A Victim Being Unable Fully To Recover Her Or His Losses

Because the injury to victims of child pornography is indivisible, using proximate cause as a vehicle to allo-

cate a victim's losses over multiple defendants is not feasible. Such a system would result in victims never receiving full recovery because each offender would be able to claim that his act alone did not proximately cause Amy's injury. This reality underlies the policy behind joint and several liability, which provides a solution to recovery of losses when the harm is indivisibly caused by multiple actors. "Where two or more causes combine to produce such a single result, incapable of division on any logical or reasonable basis, and each is a substantial factor in bringing about the harm, the courts have refused to make an arbitrary apportionment for its own sake, and each of the causes is charged with responsibility for the entire harm." Restatement (Second) of Torts § 433A, comment i (1965).

Here, each offender was a substantial factor in Amy's injury for two reasons. First, he possessed pornographic images of Amy, which alone caused severe harm to Amy each time it was viewed. See *supra* p. 10; Part I.C. Secondly, each offender's action combined indivisibly with the actions of other offenders to create the market for child pornography, without which these images would not have been produced and distributed on such a massive scale. The demand for child pornography drives the market for its production and distribution. See *supra* pp. 13-14. Without an audience of offenders, the crime of child pornography would wither rather than continue to grow at an alarming rate as it has done in recent years. See *supra* Part I.B. Offenders participate in a system of distribution and consumption that collectively causes harm to the victim. Thus, even though no individual perpetrator can be shown to

have caused the whole of the harm independently, each is a substantial factor who must be held responsible for the indivisible whole of the harm. Otherwise, the victim is left without a means for full recovery.

III. Joint And Several Liability Allows Full Recovery For The Victim And Properly Places The Burden Of The Cost On The Perpetrators Rather Than The Victim

A. Joint And Several Liability Is An Effective Solution Even If The Court Does Not Have Jurisdiction Over Each Perpetrator

Courts may order an individual defendant jointly and severally liable for a victim's full losses. Under 18 U.S.C. 2259(b)(2), a restitution order must be "issued and enforced in accordance with section 3664," which states, "[i]f the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant." 18 U.S.C. 3664(h). As the Fifth Circuit held, even if Section 3664(h) does not *require* joint and several liability under the circumstances of this case, it does not "either expressly or through implication" *forbid* applying joint and several liability to a single defendant before a district court when more than one defendant in other jurisdictions are jointly responsible for the harm. *In re Amy Unknown*, 701 F.3d 749, 770 (2012).

Nonetheless, Petitioner contends that Section 3664(h) only allows for joint and several liability when a single district court judge is sentencing multiple defendants in one case. Pet. Br. 52. The Second, Seventh, and Eighth Circuits have followed this approach. *United States* v. *Fast*, 709 F.3d 712, 723 n.6 (8th Cir. 2013); *United States* v. *Laraneta*, 700 F.3d 983, 992–993 (7th Cir. 2012), cert. denied, 187 L. Ed. 175 (2013); *United States* v. *Aumais*, 656 F.3d 147, 156 (2d Cir. 2011). The Second Circuit recently expanded on this line of reasoning by stating, "[i]f the district court lacks the power to '*make each* defendant liable for payment of the full amount'—because it does not have jurisdiction over all of the responsible parties—the plain language of the statute leaves the court only one option: to 'apportion liability among the defendants.'" *United States* v. *Lundquist*, 731 F.3d 124, 141–142 (2013) (quoting 18 U.S.C. 3664(h)).

But apportioning liability among defendants does not solve the court's concern that it lacks jurisdiction over all responsible defendants. In fact, it exacerbates it. How can the court apportion liability *among* defendants when it only has jurisdiction over one? Apportioning liability requires the capacity to review the conduct of each contributing defendant and determine which portion of the entire cost of the harm is due by each. Since the court is not reviewing the facts of all other defendants' conduct, the court would have to be able to determine a single defendant's proportional liability in a vacuum, which would result in arbitrary allocations. Furthermore, even if the court were to review the facts and circumstances of each defendant's con-

duct, apportioning liability is not possible because the harm of child pornography is indivisible, *supra* Part II.A. If a court were to ignore the indivisibility of the harm and apportion liability on an arbitrary basis with the facts and circumstances of each defendant's conduct in mind, temporal problems would quickly arise as new defendants are convicted or if any given conviction is overturned. As the number of convicted offenders changes, district courts constantly would have to reapportion the losses among them.

The unique problem in child pornography cases is that multiple offenders, some of which are unknown, from multiple jurisdictions are jointly responsible for an indivisible harm. Joint and several liability resolves this problem while individual apportionment cannot. Each court attempting to determine an individual defendant's liability without coordination with other courts would result in disparate and uncertain recovery for the victim. The most workable solution is to make each defendant jointly and severally liable regardless of whether each responsible defendant is before a given court. Each individual defendant would then be responsible for seeking contribution from other convicted defendants.[6]

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[6] Even if a victim withdraws a request for restitution from a particular defendant, a convicted defendant who has been ordered to pay restitution may nonetheless seek contribution from any other responsible defendant. See, *e.g.*, Restatement (Second) of Torts § 886A (1979) ("[W]hen two or more persons become liable in tort to the same person for the same harm, there is a right of contribution among them, even though judgment has not been recovered against all or any of them.").

B. Between An Innocent Victim And A Guilty Perpetrator, Any Individual Perpetrator Should Bear The Cost Of The Harm

Joint and several liability properly places the burden of the full cost of the harm caused to a victim on the shoulders of the guilty perpetrators rather than on the innocent victim. Without this mechanism, a victim may never be able to recover the full amount of her or his losses and would bear the cost by default, which would be a far greater injustice than any single guilty perpetrator bearing the full cost.

Congress intended that a victim of child pornography receive restitution for the "full amount of the victim's losses." 18 U.S.C. 2259(b)(1). Thus, the focus of the statute is on making victims whole. But a system that reviews each defendant's conduct in a vacuum, with uncoordinated district courts apportioning liability piecemeal, shifts the focus from restoring the victim's losses to protecting the defendants from shouldering a burden they collectively participated in placing on the victim. Congress directed full victim compensation, and only joint and several liability can achieve that clear directive. Because the victim's losses are an indivisible whole, the only feasible way to recover the full amount of the losses is via joint and several liability. In any other system, the statute's promise of full recovery becomes ephemeral, and offenders pay only a small price compared to the massive damage their collective crime has wreaked on the victim. If the statute is to be followed, any individual perpetrator must pay the full

cost of victim's indivisible harm rather than leaving the victim to bear the cost.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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In The Supreme Court of the United States

DOYLE RANDALL PAROLINE,

Petitioner,

v.

UNITED STATES AND AMY UNKNOWN,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF AMICI CURIAE NATIONAL CRIME VICTIM BAR ASSOCIATION, ARIZONA ASSOCIATION FOR JUSTICE, CONNECTICUT TRIAL LAWYERS ASSOCIATION, FLORIDA JUSTICE ASSOCIATION, AND OREGON TRIAL LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT AMY UNKNOWN

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QUESTION PRESENTED

What, if any, causal relationship or nexus between the defendant's conduct and the victim's harm or damages must the government or the victim establish in order to recover restitution under 18 U.S.C. § 2259?

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STATEMENT OF INTEREST[1]

The National Crime Victim Bar Association ("NCVBA") is an affiliate and program of the National Center for Victims of Crime. NCVBA is a specialty practice bar for attorneys who represent victims of crime in civil claims against intentional and negligent tortfeasors and in related criminal cases. NCVBA's membership consists of approximately 300 attorneys in 43 states and the District of Columbia who are committed to civil justice for victims of crime. The organization maintains a case law and pleadings database, and offers continuing legal education programs to improve the quality of legal practice in this area of the law. The NCVBA also works to increase awareness of the civil and criminal remedies available to victims of crime.

The Arizona Association for Justice, also known as the Arizona Trial Lawyers Association, was founded in 1963 and is dedicated to helping those who are injured through no fault of their own. The mission of the Arizona Association for Justice is to help any person injured by the misconduct or negligence of others to obtain justice in the courts of Arizona. The organization has a strong interest in ensuring that innocent victims of child pornography crimes are fully

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[1] Letters consenting to the filing of this amicus brief have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than amici, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

compensated for the life-altering damages they have suffered at the hands of convicted criminals.

The Connecticut Trial Lawyers Association ("CTLA"), formed in 1954, is a non-profit professional association dedicated to creating and maintaining a more decent and just society by preserving and promoting individual rights within the justice system. CTLA and its Connecticut members have a strong interest in supporting the rights of innocent victims of child pornography to pursue full and fair compensation through the justice system for the devastating damages they have suffered at the hands of criminals convicted of exploiting them for personal profit and self-gratification. Crimes against victims of child pornography present a significant societal problem that cause real and permanent harm to victims. CTLA believes perpetrators of these crimes should be held jointly responsible for paying full restitution for the serious harm they cause, pursuant to 18 U.S.C. § 2259, so that victims can pursue fair and just compensation for their injuries and perpetrators are held accountable for their wrongdoing.

The Florida Justice Association ("FJA") is a voluntary statewide association of approximately 3,000 trial lawyers concentrating on litigation in all areas of the law. The members of the FJA are pledged to the preservation of the American legal system, the protection of individual rights and liberties, the evolution of the common law, and the right of access to courts.

The Oregon Trial Lawyers Association ("OTLA") is an organization of attorneys committed to the constitutional principles of access to the courts and trial by jury, and to a fair and efficient civil justice system. Its members represent plaintiffs or claimants in personal injury, civil rights, consumer, employment, workers compensation, and business tort litigation. OTLA members often represent individuals who have been the victims of crimes, including those who have suffered child sexual exploitation.

Amici are interested in this issue because of the organizations' commitment to victims of child sex abuse and child pornography. In particular, amici's members recognize that criminal restitution is often child pornography victims' sole means of obtaining compensation because these victims are incapable of pursuing civil remedies against those who have victimized them due to the likelihood of opportunities for re-victimization in the civil discovery process.

SUMMARY OF ARGUMENTS

This Court recognized more than 30 years ago that "the exploitive use of children in the production of pornography has become a serious national problem." *New York v. Ferber*, 458 U.S. 747, 749 (1982). Since that time, the Court has also recognized that the distributors, possessors, and viewers of child pornography are also responsible for the proliferation of the child pornography problem, and that the tools

needed to attack the problem must include preventative, enforcement, and remedial laws. *Osborne v. Ohio*, 495 U.S. 103, 109 (1990) (in proscribing the possession and viewing of child pornography, Ohio sought "to destroy a market for the exploitative use of children."); *Jacobson v. United States*, 503 U.S. 540, 548 (1992) ("There can be no dispute about the evils of child pornography or the difficulties that laws and law enforcement have encountered in eliminating it."); *see also United States v. Williams*, 553 U.S. 285 (2008) (rejecting a First Amendment challenge to a law that criminalized offers to provide or requests to obtain child pornography).

Restitution has historically served a variety of penal purposes in the criminal justice system. *See, e.g., Kelly v. Robinson*, 479 U.S. 36, 52-53 (1986) (concluding that restitution in criminal proceedings "focus[es] on the State's interests in rehabilitation and punishment, rather than the victim's desire for compensation). However, beginning with the passage of the Victim and Witness Protection Act of 1982,[2] the policy reasons for ordering restitution have shifted

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[2] Pub. L. No. 97-291, 96 Stat. 1248 (1982). The restitution provisions were codified at 18 U.S.C. §§ 3579-3580 (1982). Before the passage of the Victim and Witness Protection Act, the authority to order restitution in federal criminal cases was found in 18 U.S.C. § 3651 (1982), the federal probation statute.

from rehabilitation and punishment of the defendant to compensation of the victim.[3]

In 1994 as part of the Violence Against Women Act, Congress enacted 18 U.S.C. § 2259 as a broad remedial tool to assist victims of child sexual exploitation and abuse in recovering the full financial losses resulting from the crimes perpetrated against them. That the primary purpose of § 2259 is to compensate victims of child sexual exploitation is apparent from its legislative history and express terms.

Tort law principles have often been applied by courts analyzing restitution questions, including the circuit courts that have attempted to construe § 2259. However, with the exception of the Fifth Circuit in this case, few of these courts have acknowledged that child pornography crimes are akin to intentional torts.[4] As such, legal principles applicable to intentional torts should guide the court in construing § 2259. These principles include the lenient causation requirements historically applied to intentional torts, and

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[3] According to the Senate Judiciary Committee, "[W]hatever else the sanctioning power of society does to punish its wrongdoers, it should also insure that the wrongdoer is required to the degree possible to restore the victim to his or her prior state of well-being." S. Rep. No. 532, 97th Cong., 2d Sess. 1, 30, *reprinted in* 1982 U.S. Code Cong. & Ad. News 2515, 2536.

[4] Child pornography crimes require knowing acts, and are general intent crimes. *United States v. Matthews*, 209 F.3d 338, 350-52 (4th Cir. 2000) (ruling in child pornography case that criminalization of knowing conduct without proof of specific intent or willfulness does not violate due process).

the application of joint and several liability to intentional tortfeasors who have harmed the same victim.

All perpetrators of child pornography crimes share the common purpose and effect of encouraging child sexual abuse, whether by producing, distributing, possessing, or viewing images depicting child sexual abuse. Each is dependent upon the actions of the others, and therefore, principles of joint enterprise are appropriately and fairly applied to those who produce, distribute, possess, and view images of the same child being sexually abused.

The only fair and feasible way to allocate the restitution obligation among more than a few perpetrators of child pornography crimes against a particular victim is to find each of the perpetrators jointly and severally liable to pay that victim the full amount of the victim's proven restitution. The other allocation methods used by the courts do not reflect the indivisibility of the victim's injuries, nor do they comply with § 2259's mandate that courts order restitution "in the full amount of the victim's losses." 18 U.S.C. § 2259(b)(1).

Amici urge this Court to affirm the Fifth Court's holding, including its analysis of the causation required by § 2259 and its application of joint and several liability to the producers, distributors, possessors, and viewers of child pornography, so that Congress's goal of full restitution to these victims can be achieved.

ARGUMENTS

I. Child Pornography Encourages and Perpetuates the Sexual Abuse of Children, and Broad Preventative, Enforcement, and Remedial Tools are Needed to Address the Problem.

> "Child pornography harms and debases the most defenseless of our citizens. Both the State and Federal Governments have sought to suppress it for many years, only to find it proliferating through the new medium of the Internet."

United States v. Williams, 553 U.S. 285, 307 (2008).

Indeed, the Internet has created both a worldwide market and a permanent repository for images of children being sexually abused and tortured, and both legislatures and courts have recognized that powerful preventative, enforcement, and remedial tools are needed to attack the problem. *E.g.*, *United States v. American Library Assn., Inc.*, 539 U.S. 194 (2003) (rejecting a First Amendment challenge to the Children's Internet Protection Act, which required public libraries' use of Internet filtering software in order to qualify for certain federal funding); *United States v. Williams*, 553 U.S. 285 (2008) (finding a federal law that criminalized offers to provide or requests to obtain child pornography to be constitutional against a First Amendment challenge).

Well before the explosive growth of the Internet,[5] this Court unequivocally acknowledged the importance of preventing and attacking the problem of child pornography, recognizing that its production requires that children be sexually abused: "[T]he exploitative use of children in the production of pornography has become a serious national problem[,]" and "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *New York v. Ferber*, 458 U.S. at 749, 757.

Recognizing the need for strong medicine against a virulent crime, state legislatures, Congress, and this Court have stripped First Amendment protection from the distribution, possession, and viewing of child pornography, and even from offers to provide or requests to obtain child pornography. *New York v. Ferber*, *supra* (distributing); *Osborne v. Ohio*, 495 U.S. 103, 109 (1990) (possessing and viewing); *United States v. Williams*, 553 U.S. 285 (2008) (offers to provide or requests to obtain child pornography).

The effects of child pornography crimes on the victims are long lasting and devastating, and go well beyond the abuse and torture that occurred in the creation of the images:

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[5] The origins, operation, and expansion of the Internet, and its use as a means of distribution of pornography, were first described by this Court in *Reno v. ACLU*, 521 U.S. 844 (1997).

> Child pornography victims are harmed initially during the production of images, and the perpetual nature of child pornography distribution on the Internet causes significant additional harm to victims. Many victims live with persistent concern over who has seen images of their sexual abuse and suffer by knowing that their images are being used by offenders for sexual gratification and potentially for "grooming" new victims of child sexual abuse.
>
> Child pornography offenses are international crimes. Images depicting the abuse of children are transmitted both domestically and internationally to offenders across the world, each of whom may continue to redistribute the same images. Once an image is distributed via the Internet, it is impossible to eradicate all copies of it. The harm to victims thus is lifelong.

U.S. Sentencing Commission, *Federal Child Pornography Offenses: Report to the Congress* vii (2012).

In passing the legislation that included § 2259, Congress explicitly recognized the type and scope of harms that victims of child pornography suffer, and gave federal courts the broad tools needed to compensate them.

II. Restitution for Victims of Child Pornography Serves a Number of Functions, but Its Primary Purpose is to Compensate the Victims.

Much has changed since 1986 when this Court first discussed the purposes of restitution in the American criminal justice system in *Kelly v. Robinson*. In construing the Connecticut restitution statute at issue in that case, the Court wrote, "The criminal justice system is not operated primarily for the benefit of victims, but for the benefit of society as a whole." *Kelly v. Robinson*, 479 U.S. 36, 52 (1986). That was, said the Court, "[b]ecause criminal proceedings focus on the State's interests in rehabilitation and punishment, rather than the victim's desire for compensation. . . ."[6] *Id.* at 53. *See also* Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 Harv. L. Rev. 931, 939, 941 (1984) ("When determining the amount of a restitution order, most courts consider not only the amount of the victim's loss, but also the rehabilitative, deterrent, and retributive

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[6] The Court's comments reflected the common view at the time, i.e. that the compensatory effect of criminal restitution – to the extent restitution was even available in a jurisdiction – was incidental to its penal purposes. *See, e.g.*, W. Page Keeton, *et al.*, *Prosser and Keeton on the Law of Torts* 7 (5th ed. 1984) ("Although restitution is sometimes a stated condition of probation of a convicted offender, a criminal prosecution is not concerned directly with compensation of the injured individual against whom the crime is committed, and the victim's only formal part in it is that of an accuser and a witness for the state. So far as the criminal law is concerned, the victim will leave the court empty-handed.").

effects of the order. . . . [R]estitution is an appropriate and effective criminal sanction that promotes the criminal law's goals of rehabilitation, deterrence, and retribution.").[7]

Kelly v. Robinson was decided eight years before § 2259 was enacted as part of the Violence Against Women Act ("VAWA"),[8] ten years before the Mandatory Victim Restitution Act ("MVRA")[9] was passed, and nearly twenty years before the Crime Victims' Rights Act ("CVRA")[10] unequivocally set forth Congress's intent that crime victims recover "full and timely restitution as provided in law." 18 U.S.C. § 3771(a)(6). In that 20-year period, the rights of crime victims

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[7] *See also* Alan T. Harland, *Monetary Remedies for the Victims of Crime: Assessing the Role of the Criminal Courts*, 30 UCLA L. Rev. 52 (1982); Note, *Restitution in the Criminal Process: Procedures for Fixing the Offender's Liability*, 93 Yale L. J. 505 (1984).

[8] VAWA was part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 40113, 108 Stat. 1907 (1994).

[9] Pub. L. No. 104-132, 110 Stat. 1214 (1996), codified as 18 U.S.C. § 3663A. As the Ninth Circuit has noted, the "primary and overarching goal" of the MVRA "is to make victims of crime whole, to fully compensate these victims for their losses and to restore these victims to their original state of well-being." *United States v. Gordon*, 393 F.3d 1044, 1053 (9th Cir. 2004) (internal quotations, citations, and emphasis omitted).

[10] CVRA is shorthand for the Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act, passed as part of the Justice for All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260 (2004), codified as 18 U.S.C. § 3771.

acquired constitutional status in most states,[11] and the mandates of the CVRA gave victims a meaningful role in the federal criminal justice system, which had up until then "functioned on the assumption that crime victims should behave like good Victorian children – seen but not heard." *Kenna v. U.S. Dist. Court for C.D.Cal.*, 435 F.3d 1011, 1013 (9th Cir. 2006). *See generally*, Hon. Jon Kyl, *et al.*, *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, 9 Lewis & Clark L. Rev. 581 (2005) (describing the historical background of the CVRA and its legislative history).

The primary goal of § 2259 is to fully compensate victims of child sexual exploitation. 18 U.S.C. § 2259(b)(4) (courts "shall direct the defendant to pay the victim . . . the full amount of the victim's losses . . . " regardless of the defendant's ability to pay and regardless of whether the victim has been or may be compensated for the same injuries from another source). While restitution imposed under § 2259 may also have rehabilitative, deterrent, and/or retributive effects on criminal defendants, § 2259 restitution orders must be calculated and enforced based on Congress's directive that victims of child sexual exploitation be compensated for "the full amount of [their] losses." *Id.*

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[11] Thirty-three states have amended their constitutions to provide rights to crime victims. Paul G. Cassell, *The Victims' Rights Amendment: A Sympathetic, Clause-by-Clause Analysis of the Proposal*, 5 Phoenix L. Rev. 301, 304 n.16 (2012).

III. Intentional Tort Principles Should Guide Courts in Fashioning Restitution Orders in Child Pornography Cases.

Child pornography crimes require knowing or intentional conduct. Therefore, any tort law principles to which the Court looks for guidance in interpreting and applying § 2259 should be principles that apply to intentional tortfeasors.

Joint and several liability is the rule for intentional tortfeasors. Even jurisdictions in which it has been abolished or modified by statute or court decisions, joint and several liability remains the rule for intentional tortfeasors. *See Restatement (Third) of Torts: Apportionment of Liability* § 12 at p. 110 (2000) ("Each person who commits a tort that requires intent is jointly and severally liable for any indivisible injury legally caused by the tortious conduct."). *See also Uniform Apportionment of Tort Responsibility Act* § 6(1) (2003 Rev.) ("If two or more parties adjudged liable acted in concert or with an intent to cause personal injury to . . . the claimant, the court shall enter judgment jointly and severally against the parties for their joint share.").

Although the "tort reform" movement has resulted in the adoption by many states of some form of comparative fault, nine states continue to adhere to the traditional and pure sense of joint and several liability: Alabama, *see Keibler-Thompson Corp. v. Steading*, 907 So. 2d 435 (Ala. 2005); Delaware, 10 Del. Code § 6301 (1953); Maine, 14 Me. Stat. § 156 (1965);

Maryland, Md. Code § 3-1401 (1973); Massachusetts, *see O'Connor v. Raymark Indus.*, 518 N.E.2d 510 (Mass. 1988) and Mass. Gen. Laws 231B, § 1 (1962); North Carolina, N.C. Stat. § 1B-2 (1967); Rhode Island, R.I. Gen. Laws § 10-6-2 (1956); and Virginia. Va. Code § 8.01-443 (1977). A plaintiff recovering under the laws of any of these eight states is able to recover the entire amount from any particular defendant. West Virginia also follows a pure joint and several liability rule, with limited exceptions. W.V. Code § 55-7-24 (2005). In these nine states, wrongdoers are jointly and severally liable regardless of whether they acted intentionally or negligently to cause harm. That is, if the wrongdoer concurs or combines with another wrongdoer, and together they produce injury or damage, each wrongdoer is liable for the resulting injury or damage and the negligence of each will be deemed the proximate cause of the injury. *E.g.*, *Keibler-Thompson Corp. v. Steading*, 907 So. 2d at 444. In this case, if Amy were to bring a civil suit arising from the child pornography crimes perpetrated against her in any of these nine states, she would be entitled to recover from any and all of the defendants.

In the rest of the states, some variation of comparative fault exists, but even in those states, the liability of intentional tortfeasors remains joint and several. Some states have accomplished this by excepting intentional acts from their comparative fault statutes, thereby holding negligent tortfeasors

severally liable while retaining joint and several liability for intentional tortfeasors.[12]

In a few other states that have enacted statutes limiting the application of joint and several liability, courts applying those statutes have excluded intentional torts from their reach. For example, Oregon's comparative fault legislation has been interpreted to apply to actions based on negligence and gross negligence, but not to intentional torts. *Shin v. Sunriver Preparatory Sch., Inc.*, 111 P.3d 762 (Or. App.), *rev. denied*, 122 P.3d 64 (Or. 2005). Washington's comparative fault statute has been determined not to apply at all to intentional torts. *Welch v. Southland Corp.*, 952 P.2d 162 (Wash. 1998). In these two states,

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[12] For example, Pennsylvania's comparative fault statute, the Fair Share Act, contains an exception for intentional tortfeasors, stating that they are still to be held jointly and severally liable. 42 Pa. Stat. § 7102 (2011). Similarly, in Minnesota, persons who commit intentional torts are held jointly and severally liable. Minn. Stat. § 604.02 (2003), *see Staab v. Diocese of St. Cloud*, 813 N.W.2d 68, 73 (Minn. 2012) (discussing exception that subjects intentional tortfeasors to traditional joint and several liability). New York's statute follows the same trend, putting limitations on joint and several liability except for "actions requiring proof of intent." N.Y. C.P.L.R. 1602 (McKinney 1986), *see Chianese v. Meier*, 774 N.E.2d 722 (N.Y. 2002). Other states holding intentional actors jointly and severally liable for the harm caused include: Connecticut, Conn. Stat. § 52-572h (1986), *see Allard v. Liberty Oil Equip. Co. Inc.*, 756 A.2d 237 (Conn. 2000); Florida, Fla. Stat. § 768.81 (2006), *see Smith v. Department of Ins.*, 507 So. 2d 1080 (Fla. 1987); Hawaii, Haw. Stat. § 663-10.9 (1999); New Mexico, N.M. Stat. § 41-3A-1 (1987); and Ohio, Ohio Code 2307.22 (2003).

as in every state, in actions involving a fault-free plaintiff and multiple intentional tortfeasors, the intentional tortfeasors against whom judgment has been entered are jointly and severally liable for the plaintiff's total damages. *Maguire v. Teuber*, 85 P.3d 939, 940-41 (2004), *overruled on other grounds by Barton v. State, Dep't of Transp.*, 308 P.3d 597 (2013).

Similarly, although Utah[13] has entirely abolished joint and several liability as defined by traditional common law, their comparative fault statute defines fault in such a way that it *excludes* intentional wrongs – "fault" only includes "any actionable breach of legal duty, act, or omission . . . including negligence in all its degrees, comparative negligence, assumption of risk, strict liability, breach of express or implied warranty of a product, products liability, and misuse, modification, or abuse of a product." *Egbert v. Nissan Motor Co., Ltd.*, 228 P.3d 737, 746 (Utah 2010).

As noted by the Reporter of the *Restatement (Third) of Torts: Apportionment of Liability*, "Not a single appellate decision has been found that stands for the proposition that joint and several liability of intentional tortfeasors has been abrogated or modified." *Id.* § 12, Reporters' Note, cmt. b.[14]

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[13] Utah Code Ann. § 78B-5-818 (1986).

[14] The Reporter's Note also observes that "[i]ntentional tortfeasors have been held jointly and severally liable since at least the decision in *Merryweather v. Nixan*, 8 Term Rep. 186, 101 Eng. Rep. 1337 (1799)[.]" *Id.*

With more than 200 years of unwavering precedent, the Fifth Circuit was correct to apply joint and several liability to those whose intentional production, distribution, possession, and viewing of photographs of Amy being horrifically sexually assaulted caused her permanent and unimaginable harm.

IV. Causation Requirements for Intentional Tortfeasors are More Lenient than for Negligent Tortfeasors.

Like most of the circuit courts that have applied § 2259, the parties discuss at some length whether there is a proximate cause requirement for all categories of restitution in § 2259, or just for the catch-all category in subparagraph (b)(3)(F) for "all other losses suffered by the victim as a proximate result of the offense." This focus on proximate causation is misplaced in the context of intentional torts:

> [C]ourts have generally held that where the acts of a defendant constitute an intentional tort or reckless misconduct, as distinguished from mere negligence, the aggravated nature of his action is a matter which should be taken into account in determining whether there is a sufficient relationship between the wrong and the plaintiff's harm to render the actor liable. Specifically, the factors to be taken into account are the tortfeasor's intention to commit a wrongful act, the degree of his moral wrong in so acting, and the seriousness of the harm intended.

Johnson v. Greer, 477 F.2d 101, 106-07 (5th Cir. 1973). *See also Seidel v. Greenberg*, 260 A.2d 863, 871, 873 (N.J. Super. 1969) ("[I]n a case involving [intentional or reckless misconduct] a fact finder may be permitted to find that the actor's conduct bears a sufficient causal relation to a plaintiff's harm so as to make him liable, although no such finding would be permissible if defendant's conduct were merely negligent. . . . Indeed, it appears that many of the limitations upon liability under the doctrine of 'proximate cause,' as usually expounded in negligence cases do not apply to intentional torts."); *United Food & Commercial Workers Unions, Employers Health & Welfare Fund v. Philip Morris, Inc.*, 223 F.3d 1271, 1274 (11th Cir. 2000) ("[T]he usual common law rule seems to be that the strictures of proximate cause are applied more loosely in intentional tort cases."). The rationale behind this reduced causation requirement is simple equity – someone who intentionally harms another person is more culpable than someone whose carelessness harms another person. "A higher degree of responsibility is imposed upon a wrongdoer whose conduct was intended to cause harm than upon one whose conduct was negligent." *State for Use & Benefit of Richardson v. Edgeworth*, 214 So. 2d 579, 587 (Miss. 1968).

A lenient causation requirement for intentional bad actors is also consistent with the historical consensus that intentional wrongdoers rather than their innocent victims should be financially responsible for the harm to the victim arising from the wrong.

E.g. Shades Ridge Holding Co. v. Cobbs, Allen & Hall Mortg. Co., 390 So. 2d 601, 609 (Ala. 1980) ("This trend is dictated by the policy that liability even though potentially tremendous should be imposed on the wrongdoer rather than the victim be uncompensated. Hence, even very remote causation may be found where the defendant acted intentionally."); *see also* John Henry Wigmore, *Joint-Tortfeasors and Severance of Damages*, 17 Ill. L. Rev. 458, 459 (1923) ("[W]herever there is any doubt at all as to how much [harm] each [tortfeasor] caused, take the burden of proof off the innocent sufferer[.]").

V. The Perpetrators of Child Pornography Crimes are Participants in a Common Enterprise.

Each producer, purveyor, possessor, and viewer of the photos of Amy's sexual abuse has knowingly taken part in the larger, grotesque enterprise of her sexual torture for profit, and principles of joint enterprise are appropriately and fairly applied to them.

The tort liability of participants in a common or joint enterprise is described by the leading expert as follows:

> All those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt the wrongdoer's acts done for their benefit, are equally liable.

W. Page Keeton, *et al.*, *Prosser and Keeton on the Law of Torts* § 46, at 323 (5th ed. 1984). Another leading scholar has described liability for concerted tortious acts as follows:

> Those who cooperate, tacitly or expressly, in particular conduct to pursue a common illegal design (or a legal design by illegal acts) are said to be acting in concert. Each of those acting in concert is liable jointly and severally for all of the intended or foreseeable resulting harm.

Dan B. Dobbs, *The Law of Torts* § 340, at 936 (2000). These definitions of concerted action apply squarely to those who record acts of child abuse, acquire the recordings from the recorder and distribute them to others, obtain and redistribute the recordings to others, or simply view them.

One decades-old example of an appropriate application of joint and several liability for concerted action comes from a case cited by Dobbs, *Hall v. E.I. Du Pont De Nemours & Co., Inc.*, 345 F. Supp. 353 (E.D.N.Y. 1972), which involved a suit against a group of manufacturers of dynamite blasting caps and their industry trade association for injuries caused by their product. In finding the entities jointly and severally liable for injuries to several children who had found and played with the blasting caps, the Eastern District of New York wrote:

> Joint liability has historically been imposed in four distinguishable kinds of situations:

> (1) the actors knowingly join in the performance of the tortious act or acts; (2) the actors fail to perform a common duty owed to the plaintiff; (3) there is a special relationship between the parties (e.g., master and servant or joint entrepreneurs); (4) *although there is no concerted action nevertheless the independent acts of several actors concur to produce indivisible harmful consequences.* 1 Harper & James, *The Law of Torts* § 10.1 at 697-98 (1956).
>
> *See also* Prosser, *Joint Torts and Several Liability*, 25 Calif. L. Rev. 413, 429 *et seq.* (1937).
>
> These categories reflect three overlapping but distinguishable problems with which the law of joint liability has been concerned. The first is the problem of joint or group control of risk: the need to deter hazardous behavior by groups or multiple defendants as well as by individuals. The second is the problem of enterprise liability: the policy of assigning the foreseeable costs of an activity to those in the most strategic position to reduce them. The third is the problem of fairness with respect to burden of proof: the desire to avoid denying recovery to an innocent injured plaintiff because proof of causation may be within defendants' control or entirely unavailable.

Id. at 371 (emphasis added). The court found the defendants jointly and severally liable even though the identity of the particular company whose blasting cap caused each child's injury could not be proven in

several of the cases. *Accord*, *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983) (analyzing and applying concerted action theories to hold the "passive but compliant partner" of a serial burglar jointly and severally liable for the burglar's murder of the plaintiff's decedent during a burglary even though there was no evidence the partner took part in, or knew of, the burglary or murder of the decedent; her involvement was some record keeping for, and benefitting financially from, the serial burglaries); *see generally* Wigmore, *Joint-Tortfeasors and Severance of Damages*, *supra* at 459 ("Wherever two or more persons by culpable acts, whether concerted or not, cause a single general harm, not obviously assignable in parts to the respective wrongdoers, the injured party may recover from each for the whole.").

The principle of joint enterprise liability has more recently been applied to terrorist organizations and their financial supporters. *See*, *e.g.*, *Boim v. Holy Land Found. for Relief and Dev.*, 549 F.3d 685 (7th Cir. 2008), *cert. denied*, 558 U.S. 981 (2009) (financial donors to terrorist organization held jointly and severally liable for treble damages for the act of international terrorism which resulted in plaintiff-decedent's death).

While one circuit has rejected the application of joint enterprise liability to child pornographers prosecuted in different cases in a footnote, that court undertook no meaningful analysis to arrive at its out-of-hand rejection. *United States v. Monzel*, 641 F.3d 528, 539 n.10 (D.C. Cir.), *cert. denied sub nom. Amy*

v. Monzel, 132 S.Ct. 756 (2011). Amici submit that child pornographers whose sadistic desires target the same victim are engaged in concerted action – they are tacitly cooperating in particular conduct to exploit the sexual abuse of a child. Accordingly, they should be jointly and severally liable for the harm they collectively cause that victim.[15]

VI. There is No Workable Alternative to Joint and Several Liability in This Case or in Cases Like It.

The United States and the petitioner argue that the law does not provide for the application of joint and several liability to different defendants in different cases in different jurisdictions. While it is true that § 2259 does not explicitly authorize a district court to order a child pornography perpetrator to pay restitution jointly and severally with perpetrators convicted of victimizing the same child in other jurisdictions, neither § 2259 nor the other statutes incorporated by reference into § 2259, including 18 U.S.C. § 3664(h) (authorizing apportionment of liability for restitution among defendants in the same case), forbid it.

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[15] The *Restatement (Third) of Torts: Apportionment of Liability* (2000) "takes no position on whether a concerted-action tortfeasor is also jointly and severally liable for the share of comparative responsibility assigned to an independent tortfeasor who is also liable for the same indivisible injury." *Id.* at § 15, cmt. a.

Notably, none of the parties offers a workable means of apportionment of restitution among child pornography perpetrators in different jurisdictions who targeted the same victim. That is because apportionment is not workable except in cases in which there is limited and finite distribution and possession of the images. This is a common problem in cases involving multiple tortfeasors who cause indivisible injuries,[16] to which the common-sense solution is as follows:

> Where a factual basis can be found for some rough practical apportionment, which limits a defendant's liability to that part of the harm of which that defendant's conduct has been a cause in fact, it is likely that the apportionment will be made. Where no such basis can be found, the courts generally hold the defendant for the entire loss,

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[16] No party makes a meaningful argument that Amy's injuries are divisible, and the unchallenged evidence before the district court was that Amy's damages were not divisible. The most recent *Restatement* acknowledges that damages should be treated as divisible only if there truly are separable injuries that can be attributed to different persons based on causation:

> Damages can be divided by causation when the evidence provides a reasonable basis for the factfinder to determine: (1) that any legally culpable conduct of a party or other relevant person to whom the factfinder assigns a percentage of responsibility was a legal cause of less than the entire damages for which the plaintiff seeks recovery and (2) the amount of damages separately caused by that conduct.

Restatement (Third) of Torts: Apportionment of Liability § 26(b) (2000). No such evidence was presented to the trial court.

> notwithstanding the fact that other causes have contributed to it.
>
> The distinction is one between injuries which are reasonably capable of being separated and injuries which are not.

W. Page Keeton, *et al.*, *Prosser and Keeton on the Law of Torts* § 52, at 345 (5th ed. 1984).

This is not a case in which apportionment is possible. The record below, created several years and thousands of downloads ago, indicates that the National Center for Missing and Exploited Children had identified 35,570 of Amy's child sexual abuse images among the evidence in more than 3,200 cases. The anguish experienced by Amy is not from the knowledge that any one of the thousands of individuals has viewed the images, but from the knowledge that thousands have done so, and continue to do so, and will continue to do so for the rest of her life. Every person who views her image causes her harm, and the apportionment methods discussed and applied by the other circuits in their efforts to calculate and award restitution to Amy, as described below, demonstrate the impossibility of reasoned apportionment.

The Second, Ninth, and Tenth Circuits' approach has been to require particularized harm by individual defendants. *United States v. Aumais*, 656 F.3d 147, 154-55 (2d Cir. 2011) (no basis for restitution award against Aumais where no evidence that victim had any direct contact with Aumais or knew of his existence; under these circumstances, Aumais was not a

proximate cause of the victim's loss); *United States v. Kennedy*, 643 F.3d 1251, 1263 (9th Cir. 2011) (evidence that Kennedy "participated in the audience of persons" who viewed the victims' images was sufficient to establish that Kennedy was "one cause of the generalized harm" suffered by the victims but "not sufficient to show that they [Kennedy's actions] were a proximate cause of any particular losses."); *United States v. Benoit*, 713 F.3d 1, 21 (10th Cir. 2013) ("The evidence presented at Benoit's sentencing hearing suggests that Vicky has suffered various losses based on her knowledge that individuals receive and possess visual depictions of her exploitation. However, the evidence that Benoit was specifically responsible for any of these losses was relatively thin.").

Limiting restitution to defendant-specific harm does not provide any compensation for the harm caused by the aggregate pattern of viewing the victim's images. As this Court acknowledged over thirty years ago in *New York v. Ferber*, "the materials produced are a permanent record of the children's participation and harm to the child is exacerbated by their circulation." 458 U.S. at 759. In the vast majority of cases, as in this one, the harm caused by the aggregate pattern of viewing will dwarf any identifiable case-specific harm, and restitution limited only to case-specific or defendant-specific harms will fall far short of the "full" restitution commanded by § 2259.

The First Circuit has awarded restitution based on averaging of awards. In *United States v. Kearney*, 672 F.3d 81, 100-01 (1st Cir. 2012), *cert. dismissed*,

133 S.Ct. 1521 (2013), the court approved entry of an award that averaged thirty-three prior restitution awards, discarding the highest and lowest awards. This approach lacks a principled basis and is therefore arbitrary for several reasons: First, the approaches used by courts in the other benchmark cases may themselves vary widely or be inconsistent with each other. Second, awards in those courts declining to impose joint and several liability (the majority of courts to date) will be a tiny fraction of a "full" award for the victim's harm, because average awards in most courts rejecting joint and several liability have been in the thousands of dollars rather than the over three million dollars calculated as Amy's total harm to date. Third, an average of restitution awards in federal child pornography cases fails to capture the contributions of perpetrators prosecuted for child pornography under state rather than federal law, not to mention the contribution of perpetrators not yet detected or for some reason not yet prosecuted in any jurisdiction. Fourth, the viewing of a victim's images is inherently an open ended phenomenon, because the images remain in various locations on the Internet, or in various computers used for distribution, and are continually being accessed by new or additional viewers. Even if a court could determine an accurate head count of perpetrators at one moment, that figure would become obsolete the next day. For all these reasons, an attempt to base a § 2259 restitution award on some average derived from awards in other federal cases will lead to arbitrary and unreasonable results,

again falling far short of the required "full" restitution award.

The Sixth Circuit adopted the United States' previously-recommended means of calculating restitution awards under § 2259 – on a per capita basis calculated from the number of defendants previously convicted of crimes involving the same victim. *United States v. Gamble*, 709 F.3d 541, 554 (6th Cir. 2013), approved a formula based on first calculating a "pool of a victim's provable losses that are not traceable to a single defendant" and then dividing this total loss by "the number of convicted possessors" as a "reasonable divisor." This per capita division is inherently arbitrary. It is not based on any finding that the particular defendant caused any particularized portion of the victim's harm. *See United States v. Benoit*, 713 F.3d at 22 (calculating portion of restitution award against Benoit by "implicit" per capita division of Vicky s total losses by the 222 restitution judgments Vicky had received to date was "not sufficient to show" that Benoit was " a proximate cause of any particular losses," at least in the absence of a specific finding that the victim's losses were "roughly equally" caused by each defendant). A per capita division of the victim's total loss among the hundreds or thousands of federal defendants would likely result in each award being a tiny fraction of "full" compensation, amounting in this case to thousands rather than millions of dollars. A per capita award based on that figure or figures of a similar order of magnitude would result in an award per case less than a thousandth of

Amy's "full" restitution, which is surely not what the drafters of § 2259 intended.

The per capita approach shares other problems with the average-of-awards approach. Calculation of a per capita share of the "full" harm based on the nationwide number of federal defendants would not capture the harms caused by perpetrators being prosecuted only in state courts. Even if defendants prosecuted in state courts could be added to the mix, there would still be harm from the aggregate viewing of perpetrators never caught or not yet prosecuted in any court. Because the offense is open ended and new perpetrators participate daily, any attempt to calculate an individual defendant's fractional per capita share of the total harm, whether based on federal defendants alone or on both state and federal defendants, would be obsolete immediately after it was made. The per capita approach is just as arbitrary as the average of awards approach, and just as much in violation of the statutory command of § 2259 to award full restitution.

The Eighth Circuit's approach has been to limit restitution awards on the basis of the date a particular defendant is found to have begun viewing prohibited images. *United States v. Fast*, 709 F.3d 712, 715, 723 (8th Cir. 2012) (affirming award of $3,333 in restitution based on finding that Fast began viewing victim's images on June 25, 2010). This approach, like the others mentioned above, does not take into account the open ended nature of the offense and the constant addition of additional perpetrators

participating in the aggregate harm caused by the collective viewing of the victims' images. It is also unclear from the *Fast* opinion exactly how the temporal allocation was or could be made. Arbitrarily tying restitution awards to expenses incurred after a certain date, if that indeed was the approach taken by the *Fast* court, would result in a failure to compensate the victim for a large part of the aggregately-caused harm, thus again falling far short of "full" compensation.

The Fourth, Eleventh, and D.C. Circuits have simply directed the trial courts to use some allocation method within their discretion, other than joint and several liability, without providing meaningful guidance on what that method might be. *United States v. Burgess*, 684 F.3d 445, 460 (4th Cir.), *cert. denied*, 133 S.Ct. 490 (2012) (noting that the "culpability of any one defendant regarding Vicky's loss is dependent at least in part on the role that defendant played with respect to her exploitation" but otherwise remanding for a redetermination of the restitution amount without suggesting a formula or calculation procedure); *United States v. McDaniel*, 631 F.3d 1204 (11th Cir. 2011) (affirming award of $12,700 in restitution without explanation of calculation method); *United States v. Monzel*, 641 F.3d at 540 ("on remand, the district court should consider anew the amount of Amy's losses attributable to Monzel's offense and order restitution equal to that amount," while acknowledging that "there is relatively little in the present record to guide its decisionmaking on this. . . ."); *see also United*

States v. Benoit, 713 F.3d at 22-23 ("we remand for a redetermination of the portion of damages allocable to Benoit, if any"); *cf. United States v. Gamble*, 709 F.3d at 554 (approving per capita allocation, but acknowledging that "different divisors may be reasonable" and that per capita apportionment "is not necessarily the only way to calculate restitution."); *United States v. Hargrove*, 714 F.3d 371 (6th Cir. 2013) (following *Gamble*).

As is apparent from these cases, leaving matters to the discretion of trial courts, without specifying guidelines or an appropriate approach to calculating an award under § 2259, invites arbitrary, unreasonable, and inconsistent results. Whatever else may be true about § 2259 restitution awards, the trial courts require clear guidance as to how they should be calculated.

VII. There is Nothing Fundamentally Unfair or Unworkable About Imposing Joint and Several Liability on Child Pornography Perpetrators Who Victimize the Same Child.

The primary argument against joint and several liability for all purveyors and possessors of child abuse images involving the same child is that it is not fair – that it would mean the producer of a child abuse image is ordered to pay the same amount of restitution as someone who merely downloads and views the image. Congress rejected the fairness argument in

1994 when it made all perpetrators of child pornography crimes liable for their victims' full losses.

Moreover, Congress's intent to treat child sexual exploitation restitution different from restitution awarded for other crimes is apparent in the express language of § 2259, which states that such restitution is to be calculated and enforced "[n]otwithstanding section 3663 or 3663A," in which the definition of "victim" and awardable losses are different. It is notable that despite this clear congressional intent to fully compensate victims of child sexual exploitation, several of the circuits that have held that joint and several liability for intentional tortfeasors is not available under § 2259 have upheld restitution orders holding multiple defendants jointly and severally liable to pay restitution for financial crimes. *E.g. United States v. Aumais*, 656 F.3d at 156 (no joint and several liability under 18 U.S.C. § 2259); *United States v. Tzakis*, 736 F.2d 867, 870-71 (2d Cir. 1984) (joint and several liability under 18 U.S.C. § 3651, probation, wire and travel fraud).[17]

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[17] *See also* Sixth Circuit: *United States v. Gamble*, 709 F.3d at 550-55 (no joint and several liability under 18 U.S.C. § 2259) and *United States v. Hunt*, 521 F.3d 636, 649 (6th Cir. 2008) (joint and several liability under 18 U.S.C. § 3664, health care fraud); Seventh Circuit: *United States v Laraneta*, 700 F.3d 983, 991-93 (7th Cir. 2012), *reh. denied en banc*, – F.3d – (7th Cir. 2013), *cert. denied*, 187 L. Ed. 2d 175 (2013) (no joint and several liability under 18 U.S.C. § 2259) and *United States v. Sensmeier*, 361 F.3d 982, 990-91 (7th Cir. 2004) (joint and several liability under 18 U.S.C. § 3663A, conspiracy and mail fraud); Eighth

(Continued on following page)

Additionally, in contrast to its express preemption of §§ 3663 and 3663A, Congress expressly incorporated § 3664 into § 2259. Section 3664 allows the court to consider a defendant's ability to pay when determining the manner in which the defendants must pay restitution. The fact is that most federally-convicted child pornographers are indigent. U.S. Sentencing Commission, *Federal Child Pornography Offenses: Report to the Congress* 192 (2012) (citing data from fiscal year 2010, Commission reported that 47.5% of child pornography distributors and possessors reported a negative net worth during the presentence investigation, and another 24.7% reported net worth of less than $10,000). Shifting the burden of paying restitution to convicted offenders who do have the ability to pay it in order to make the victim whole is far more equitable than leaving the victim uncompensated.

The Petitioner also warns of the possibility of overcompensation of the victim if convicted defendants are jointly and severally liable for paying restitution. This is a red herring. The only person in a position to track restitution in cases such as this is the victim,

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Circuit: *United States v. Fast*, 709 F.3d at 723 n.6 (no joint and several liability under 18 U.S.C. § 2259); and *United States v. Moten*, 551 F.3d 763 (8th Cir. 2008) (joint and several liability under 18 U.S.C. § 3664, aiding and abetting theft of public funds); Ninth Circuit: *Amy v. United States* (*In re Amy*), 714 F.3d 1165, 1167-68 (9th Cir. 2013) (no joint and several liability under 18 U.S.C. § 2259) and *United States v. Angelica*, 951 F.2d 1007, 1010 (9th Cir. 1991) (joint and several liability under 18 U.S.C. § 3663, mail fraud).

because restitution is awarded to her in both federal and state cases. While the federal government may well have access to restitution awarded to victims in different federal cases around the country, they cannot reasonably be expected to know what restitution has been awarded or collected by the victims in state cases. As Amy has done in this case, the answer to the remote possibility of overcompensation is to require victims to disclose what they have received to date at the time of each sentencing. Indeed, such a requirement is contemplated by § 3664(j), which requires the court to reduce restitution award if a victim has received compensation from other sources.

Finally, in the very hypothetical circumstance that the victim ever approaches "full" payment of the aggregate restitution awarded, the government and victim would be obligated to cease enforcement efforts. *See* 18 U.S.C. § 3664(j)(2) (restitution order must be reduced by amounts recovered by victim in civil suits) and 3664(m) (restitution order enforceable in the manner provided for in 18 U.S.C. §§ 3571-3574 and 3611-3615); 18 U.S.C. § 3613(3)(c) ("order of restitution made pursuant to sections . . . 2259 . . . or 3664 of this title is a lien in favor of the United States . . . and continues for 20 years or until the liability is satisfied, remitted, set aside, or is terminated. . . .").

CONCLUSION

This Court recently commented on the foresight of the Framers of our Constitution in drafting a

document "capable of such resilience through time." *United States v. Comstock*, 560 U.S. 126, 130 S.Ct. 1949, 1965 (2010). Much of that resilience comes from the Necessary and Proper Clause, which permits Congress to legislate in a manner that is "reasonably adapted to the attainment of a legitimate end under the commerce power or under other powers that the Constitution grants Congress the authority to implement." *Id.* at 1957 (internal quotations omitted). While the Framers could not have conceived of the horrific, destructive scourge that child pornography has become, Congress has recognized the problem, and has given the federal courts broad authority and specific tools to address it. Those tools include 18 U.S.C. §§ 2259 and 3664, which give the courts the ability to order producers, distributors, and possessors of images depicting the sexual abuse of a child to pay restitution in the full amount of the child's losses, and to hold them jointly and severally liable for full payment.

This Court should affirm the Fifth Circuit's restitution award, which applied the tools provided and intended by Congress to give victims of child pornography crimes a chance at being fully compensated for their losses.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

DOYLE RANDALL PAROLINE,
Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL CRIME VICTIM LAW INSTITUTE, ARIZONA VOICE FOR CRIME VICTIMS, CHILD JUSTICE, INC., MARYLAND CRIME VICTIMS' RESOURCE CENTER, INC., NATIONAL CENTER FOR VICTIMS OF CRIME, AND NATIONAL ORGANIZATION FOR VICTIM ASSISTANCE AS AMICI CURIAE SUPPORTING RESPONDENT AMY UNKNOWN

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QUESTION PRESENTED

What, if any, causal relationship or nexus between the defendant's conduct and the victim's harm or damages must the government or the victim establish in order to recover restitution under 18 U.S.C. § 2259?

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INTEREST OF AMICI CURIAE[1]

Amici Curiae National Crime Victim Law Institute, Arizona Voice for Crime Victims, Child Justice, Inc., Maryland Crime Victims' Resource Center, Inc., National Center for Victims of Crime, and National Organization for Victim Assistance are nonprofit organizations whose missions are to promote the interests of crime victims and other victims of abuse in the justice system through victim services, public resources, legal advocacy, and education.[2] Each amicus has previously participated in cases involving crime victims' rights. This case involves fundamental rights and interests of crime victims across the country because it concerns the standard for victims, most specifically victims of child abuse images, to receive restitution under federal law.[3]

SUMMARY OF ARGUMENT

Congress has enacted a comprehensive, mandatory restitution scheme whose "primary and overarching goal ... is to make victims of crime whole [and] to fully compensate these victims for their losses." *United States* v. *Gordon*, 393 F.3d 1044, 1053 (9th Cir. 2004) (internal quotation marks and emphasis omitted). This

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[1] Letters consenting to the filing of this amicus brief have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

[2] The mission of each organization is more fully described in an appendix to this brief.

[3] Although the term "child pornography" is commonly used to describe an image that depicts a child being sexually abused, its use dilutes the reality of the victimization the image depicts. Consequently, throughout this brief, the term "child abuse image" is used instead of "child pornography."

statutory scheme represents an important development in the protection of crime victims, and reflects Congress's recognition of the harms crime victims suffer and the need to compensate victims for their losses.

Section 2259 is a key component of this congressional scheme, requiring restitution for victims of sexual-exploitation offenses related to child pornography. Section 2259 provides, for such offenses, that a restitution order "shall direct the defendant to pay the victim ... the full amount of the victim's losses." 18 U.S.C. § 2259(b)(1). Despite that broad remedial mandate, lower courts have often failed to award victims of child abuse images full restitution for their losses. In fact, some courts have declined to award any restitution at all because they could not tie the victim's harm to the particular conduct of an individual defendant. That approach is wrong as a matter of law, misunderstands the nature of a victim's harm, and erects insurmountable hurdles to a victim's full recovery of her losses.

The failure of many courts to award restitution for all of a victim's losses stems in part from misapplication of the common law tort principles that must be presumed to have informed Congress's crafting of § 2259 and which effectuate Congress's purpose of full and mandatory restitution for crime victims. Those common law principles compel two conclusions: (1) to establish that a particular perpetrator was a cause of the psychological trauma she suffers and the losses she has incurred due to the circulation of images of her abuse, a victim need not establish that the perpetrator's conduct was a necessary or independently sufficient condition; and (2) criminal defendants who create, traffic in, possess, and view images of a victim's sexual abuse are jointly and severally liable for the full amount of the victim's losses.

Tort law has long recognized that, where multiple perpetrators engage in separate but related conduct causing injury, an individual perpetrator does not escape responsibility for causing the injury simply because, due to others' wrongful conduct, his conduct was neither necessary nor sufficient to cause the harm. *See* Keeton et al., *Prosser and Keeton on the Law of Torts* § 41, at 268 (5th ed. 1984) (*Prosser & Keeton*). If the law were otherwise, no individual could be held responsible for the harms perpetrators collectively inflict on a victim, no matter how substantial. That result would be inconsistent with established tort principles and would fundamentally undermine Congress's purposes in enacting § 2259.

Further, tort law generally holds multiple tortfeasors—and especially *intentional* criminal actors—jointly and severally liable for any indivisible injury they cause. *See Restatement (Third) of Torts* § A18 (2000) (*Restatement*). Petitioner and others who traffic in and view sex abuse images cause victims such as Amy an indivisible injury; the psychological harm she suffers and the losses she has incurred due to the circulation of images of her abuse cannot be parceled out and assigned to individual perpetrators. Under established tort principles that properly inform the Court's reading of § 2259, criminal defendants who deal in and view images of Amy's abuse should be held jointly and severally liable.

The Government would have the Court follow the first rule but abandon the second, arguing that § 2259 does not expressly *require* joint and several liability and that a victim's harm is "theoretically" divisible. *See* U.S. Br. 21-22, 42. But even if Amy's injury were divisible in theory (and it is not), joint and several liability generally applies where, as here, *practical* division

is impossible. Congress understood the unique harm suffered by victims such as Amy. By enacting § 2259's mandate of full restitution, Congress decided that, between Amy and Petitioner, Petitioner must bear the burden of Amy's losses. Further, the Government's proposal of ad hoc apportionment determinations provides no practical guidance to district courts calculating restitution awards and scant assurance that Congress's purpose of ensuring restitution for the "full amount" of a victim's losses will be effectuated. 18 U.S.C. § 2259(b)(1).

ARGUMENT

I. Section 2259 Does Not Require A Victim To Trace Her Harm To The Particular Conduct Of An Individual Defendant

The victims of child abuse images suffer grave harm at the hands of those who create, traffic in, possess, and view those images. They live with fear, humiliation, and pain, haunted by the knowledge that images of their abuse are continuously available to be passed from perpetrator to perpetrator and that anyone they encounter may have seen the images or may see the images in the future. This harm produces economic losses and pecuniary damages for which Congress has mandated full restitution. The injury and resulting economic harm cannot be neatly parceled out and traced to particular individual perpetrators, and Section 2259 imposes no such requirement. Each perpetrator causes the injury, whether the perpetrator is the 1,000th or 10,000th person to view the images. Under common law principles—in light of which Congress is presumed to have enacted § 2259, *see Samantar* v. *Yousuf*, 560 U.S. 305, 320 n.13 (2010)—an individual, intentional victimizer is no less the cause of the victim's

injuries because others have also caused the injury by participating in the same crime.

A. Victims of Child Abuse Images Suffer Grave Harm Caused by All Who Create, Possess, Distribute, and View Those Images

The acute harms caused to victims of child abuse images are well established. As this Court has recognized, "the materials produced by child pornographers permanently record the victim's abuse," and the images' "continued existence causes the child victims continuing harm by haunting the children in years to come." *Osborne* v. *Ohio*, 495 U.S. 103, 111 (1990). "It is the fear of exposure and the tension of keeping the act secret that seem to have the most profound emotional repercussions." *New York* v. *Ferber*, 458 U.S. 747, 759 n.10 (1982) (internal quotation marks and brackets omitted). Victims must go through life knowing that the images of their trauma are uncontainable, and will likely circulate forever.

Congress has expressly recognized these harms in proscribing the possession of child abuse images. *See United States* v. *Kearney*, 672 F.3d 81, 94 (1st Cir. 2012). It has "repeatedly emphasized, in legislation amending the laws governing child pornography, the continuing harm the distribution and possession of child pornography inflicts." *Id.*; *see, e.g.*, Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110-358, tit. I, § 102(3), 122 Stat. 4001, 4001 ("Child pornography is a permanent record of a child's abuse and the distribution of child pornography images revictimizes the child each time the image is viewed."); Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 501(2)(D), 120 Stat. 587, 624 ("Every instance of viewing images of child pornography represents a

renewed violation of the privacy of the victims and a repetition of their abuse.").

Both the Government and the Petitioner acknowledge the extent and nature of the harm and the resulting economic losses that victims like Amy suffer. *See* U.S. Br. 40 ("Amy's harm and her resulting losses ... stem at least in part from the knowledge that her image is being generally circulated and that a *group* of people are viewing her images." (internal quotation marks and brackets omitted)); Pet. Br. 50 ("Amy's profound suffering is due in large part to her knowledge that each day, untold numbers of people across the world are viewing and distributing images of her sexual abuse.").

B. Every Person Who Creates, Distributes, Possesses or Views Abuse Images Causes The Victim's Harm

The trauma, fear, humiliation, psychological injury, and the resulting financial losses suffered by victims like Amy cannot be divided up and attributed piece-by-piece to particular defendants. Yet there can be no question that *all* who have produced, possessed, distributed, and viewed images of Amy's abuse caused her harm.[4] *See Kearney*, 672 F.3d at 94-95 ("The Supreme

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[4] As the Government notes, causation is typically described as involving two issues: factual causation and proximate causation. *See* U.S. Br. 18. Factual causation asks whether the defendant's conduct caused the victim's harm, an inquiry for which there is more than one test. *See* Dobbs et al., *The Law of Torts* § 185, at 621 (2d ed. 2011). Proximate causation delineates the "appropriate scope of the defendant's legal liability," an analysis that rests on considerations such as the foreseeability of the victim's harm. *See id.* Respondent Amy aptly describes why Section 2259 lacks a proximate cause requirement, *see* Resp't Amy Br. 17-37, and the Government persuasively explains why any proximate cause requirement would be met in this case in any event, *see* U.S. Br. 35-

Court has repeatedly explained, for thirty years, that individuals depicted in child pornography are harmed by the continuing dissemination and possession of such pornography containing their image." (citing *Ferber*, 458 U.S. at 759; *United States* v. *Williams*, 553 U.S. 284, 303 (2008); *Osborne*, 495 U.S. at 111)).

Several lower courts have misapprehended the nature of victims' harm, and have erroneously required a specific link between an identifiable portion of the victim's harm and the conduct of a particular defendant. They have thus denied or limited restitution to victims on the ground that a particular defendant's "possession of a single image of [a victim] was neither a necessary nor a sufficient cause of all of her losses." *United States* v. *Monzel*, 641 F.3d 528, 538 (D.C. Cir. 2011); *see also, e.g.*, *United States* v. *Benoit*, 713 F.3d 1, 20, 23 (10th Cir. 2013); *United States* v. *Fast*, 709 F.3d 712, 722-723 (8th Cir. 2013); *United States* v. *Aumais*, 656 F.3d 147, 153-155 (2d Cir. 2011). Petitioner's argument invites this Court to impose a similar restriction. He contends that "some evidence must be presented that shows that 'but for' a defendant's conduct, the losses or damages would not have occurred." Pet. Br. 49; *see also id.* at 49-50 (Amy has made "no showing" that her losses are traceable to Paroline's conduct; Amy has "suffered tremendously" from her abuse "regardless of what Pa-

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40. Because any proximate cause standard would be met here in any event, this Brief focuses on closely related questions that fall within the question presented as formulated by this Court (and are also addressed by the parties): (1) whether the victim of a harm that was caused by multiple persons must trace her harm to the particular conduct of an individual defendant in order to establish her right to restitution from that defendant, and (2) whether a defendant who, along with others, caused the harm to the victim may be held jointly and severally liable for the victim's losses.

roline did"); *id.* at 50 (Petitioner's "possession of two images of Amy was neither a necessary nor a sufficient cause of all of her losses").

The law requires no such showing. Not only would Petitioner's standard make recovery by victims practically impossible, contrary to the explicit mandate of § 2259, it also ignores the well-established common law background of tort liability principles, against which Congress is presumed to have legislated. *See Samantar*, 560 U.S. at 320 n.13 ("Congress is understood to legislate against a background of common-law principles." (ellipsis and internal quotation marks omitted)); *see also United States* v. *United States Gypsum Co.*, 438 U.S. 422, 437 (1978) ("Congress will be presumed to have legislated against the background of our traditional legal concepts"). As many courts have recognized, the common law backdrop applicable here is that of the law of torts because, like tort law, Section 2259's purpose is "'to afford compensation for injuries sustained by one person as the result of the conduct of another.'" *Prosser & Keeton* § 1, at 6 (quoting Wright, *Introduction to the Law of Torts*, 8 Cambridge L.J. 238 (1944)); *see United States* v. *Burgess*, 684 F.3d 445, 457 (4th Cir. 2012) ("A plurality of circuits have employed an overlay of traditional tort principles to the statutory language [of § 2259]."); *Monzel*, 641 F.3d at 535 n.5 ("Although § 2259 is a criminal statute, it functions much like a tort statute by directing the court to make a victim whole for losses caused by the responsible party." (citing *United States* v. *Bach*, 172 F.3d 520, 523 (7th Cir. 1999) ("Functionally, the Mandatory Victims Restitution Act is a tort statute, though one that casts back to a much earlier era of An-

glo-American law, when criminal and tort proceedings were not clearly distinguished.")))."[5]

Traditional tort law principles effectuate Congress's purposes in enacting § 2259 to provide victims restitution for the "full amount" of their losses. Under those principles, where the conduct of multiple wrongdoers causes a victim harm, the act of *each individual wrongdoer* is a cause of that harm, even if the individual's conduct was neither necessary nor independently sufficient to cause the harm. *See Prosser & Keeton* § 41, at 268 ("When the conduct of two or more actors is so related to an event that their combined conduct, viewed as a whole, is a but-for cause of the event, and application of the but-for rule to them individually would absolve all of them, the conduct of each is a cause in fact of the event."). As the *Restatement* explains: "In some cases, tortious conduct by one actor is insufficient, even with other background causes, to cause the plaintiff's harm. Nevertheless, when combined with conduct by other persons, the conduct overdetermines the harm, *i.e.*, is more than sufficient to cause the harm." *Restatement* § 27 cmt. f. In this circumstance, "the fact that the other person's [or persons'] conduct is sufficient to cause the harm does not prevent the actor's conduct from being a factual cause of harm." *Id.* Instead, it is enough that the conduct at issue contrib-

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[5] The relevance of traditional tort principles distinguishes § 2259 from 21 U.S.C. § 841(b)(1)(C), the statute the Court is considering in *Burrage* v. *United States*, No. 12-7515. Section 841(b)(1)(C) does not function like a tort statute, but rather like a typical criminal liability provision: it imposes a sentence of imprisonment ranging from twenty years to life upon a determination that use of the drugs sold by the defendant "result[ed]" in death or serious bodily injury. 21 U.S.C. § 841(b)(1)(C). Traditional tort principles have little bearing on the proper interpretation of that provision.

utes to a set of conditions that causes the harm to occur (*i.e.*, the individual's conduct is part of a sufficient causal set). *See id.*

In other words, tort law provides a straightforward and sensible answer to the causation problem that has troubled some lower courts in the criminal restitution context: there is no safety in numbers. A perpetrator cannot avoid responsibility for causing a victim's injuries simply because other perpetrators' related conduct was, collectively, necessary and sufficient to cause the victim's indivisible harm. If the law were otherwise—*i.e.*, if a defendant were relieved of responsibility in such circumstances—then no individual could be held responsible for the harms perpetrators collectively inflict, no matter how substantial. Tort law avoids that inequitable result by recognizing that each participant caused the victim's indivisible harm.

The common law is replete with cases applying this principle. For example, twenty-six mill owners who polluted a creek were enjoined and held liable for damages even though the discharge by each "single party would not cause any material change to the plaintiff." *Warren* v. *Parkhurst*, 92 N.Y.S. 725, 727 (N.Y. Sup. Ct. 1904), *aff'd*, 93 N.Y.S. 1009 (App. Div. 1905), *aff'd*, 78 N.E. 579 (N.Y. 1906). Although "[n]o one defendant caused that injury[,] [a]ll of the defendants did cause it." *Id.* at 728; *see also Anderson* v. *Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.*, 179 N.W. 45, 49 (1920) (railway company that caused a fire that merged with other fires to destroy plaintiff's property could be held liable for the entire damage), *overruled in part on other grounds*, *Borsheim* v. *Great N. Ry. Co.*, 183 N.W. 519 (Minn. 1921). Similarly, a court saw no difficulty in holding a defendant to have caused flood damage to plaintiff's basement even though another person con-

tributed to the flooding. *Slater* v. *Mersereau*, 64 N.Y. 138, 147 (N.Y. 1876) ("It is no defence for a person against whom negligence which caused damage is proved, to prove that without fault on his part the same damages would have resulted from the act of another."). In short, tort law has rejected the notion that an individual perpetrator does not cause a victim's harm in these circumstances.

Lower courts determining restitution under § 2259 have often missed this fundamental principle. Notable is the D.C. Circuit's *Monzel* decision, which erroneously required that restitution be based on the amount of a victim's harm traceable to a particular defendant, where the defendant's conduct "was neither a necessary nor a sufficient cause of all of [the victim's] losses." *Monzel*, 641 F.3d at 538. The court's reasoning conflated apportionment of damages principles (discussed below) with causation, *see id.*, and failed to recognize that in these circumstances tort law deems each perpetrator's act to be a cause of a victim's injuries even where any particular individual's conduct is not necessary or sufficient by itself to cause the injury.

In addition, the *Monzel* rule produces precisely the inequitable result the common law rule is designed to avoid: it leaves a victim with essentially no recovery even where the victim was clearly harmed by the aggregate conduct of multiple perpetrators. On remand in *Monzel*, the district court attempted to apply the D.C. Circuit's traceability requirement and ultimately *declined to award Amy any restitution at all.* The court found it "impossible to fashion a formula that pinpoints [the defendant's] degree of responsibility for Amy's suffering." Mem. Order, *United States* v. *Monzel*, No. 1:09-CR-243 (GK), at 8 (D.D.C. Nov. 6, 2012), EFC #70. Other circuits following *Monzel*'s reasoning have left vic-

tims similarly empty-handed, *see, e.g.*, *Aumais*, 656 F.3d at 155; Minute Entry, *United States* v. *Kennedy*, No. 2:08-CR-00354-RAJ (W.D. Wash. Aug. 24, 2012), ECF #181, or have suggested that restitution may be unavailable unless a victim can provide evidence tracing her harm to the specific defendant, *see, e.g.*, *Benoit*, 713 F.3d at 22-23 (remanding to the district court "for a redetermination of the portion of damages allocable to Benoit, *if any*" (emphasis added)).

That result is fundamentally at odds with § 2259 and its purpose. The "primary and overarching goal" of Congress's statutory restitution scheme for crime victims is "to fully compensate these victims for their losses and to restore these victims to their original state of well-being." *United States* v. *Simmonds*, 235 F.3d 826, 831 (3d Cir. 2000). Restitution can be a pivotal step in a victim's recovery. *See, e.g.*, Sangalis, *Elusive Empowerment: Compensating the Sex Trafficked Person under the Trafficking Victims Protection Act*, 80 Fordham L. Rev. 403, 438 (2011). To that end, § 2259 provides that courts "*shall* order restitution for any offense under this chapter" and that such restitution order "*shall* direct the defendant to pay the victim ... the *full amount of the victim's losses*." 18 U.S.C. § 2259(a) & (b)(1) (emphasis added). That language leaves no room for courts to leave victims empty-handed on the ground that no individual defendant's conduct by itself was necessary or sufficient to cause the victim's harm. *See Corley* v. *United States*, 556 U.S. 303, 314 (2009) (statutes must be interpreted "so that no part will be inoperative or superfluous, void or insignificant" (internal quotation marks omitted)).

II. The Traditional Tort Law Principles That Inform This Court's Analysis Require That Perpetrators Be Held Jointly And Severally Liable For Restitution Under Section 2259

Determining whether a defendant caused a victim's injury and apportioning damages for that injury are distinct issues. Once causation is established, "a further question may arise as to the portion of the total damages sustained which may properly be assigned to the defendant, as distinguished from other causes." *Prosser & Keeton* § 52, at 345. That apportionment question turns, under traditional tort principles, on whether the victim's harm can practically be divided and attributed to various perpetrators. If the victim's harm is divisible, each defendant is liable for damages for his portion of the harm; if not, defendants are held jointly and severally liable. *See* 3 Harper et al., *Harper, James and Gray on Torts* § 10.1, at 6-7 (3d ed. 2006) (Harper). These principles inform the Court's interpretation of § 2259 here, *see Samantar*, 560 U.S. at 320, n.13, and mandate that those who deal in and view images of Amy's abuse be held jointly and severally liable for all of her harm.

A. Tort Law Imposes Joint And Several Liability Where Multiple Persons Cause An Indivisible Injury

Traditional tort principles apply joint and several liability where multiple tortfeasors cause a victim an indivisible injury. *See Restatement* § A18. If the tortious conduct by multiple persons is the cause of an indivisible injury, "each person is jointly and severally liable for the recoverable damages caused by the tortious conduct." *Id.*; *see also Prosser & Keeton* § 52, at 347 ("Where two or more causes combine to produce

such a single result, incapable of any reasonable division, each may be a substantial factor in bringing about the loss, and if so, each is charged with all of it.").

This Court has recognized these principles, explaining that the common law "allows an injured party to sue a tortfeasor for the full amount of damages for an indivisible injury that the tortfeasor's negligence was a substantial factor in causing, even if the concurrent negligence of others contributed to the incident." *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 260 (1979) (citations omitted). *Edmonds* elaborated on the scope of the rule:

> A tortfeasor is not relieved of liability for the entire harm he caused just because another's negligence was also a factor in effecting the injury. Nor are the damages against him diminished.... A concurrent tortfeasor generally may seek contribution from another, but he is not relieved from liability for the entire damages even when the nondefendant tortfeasor is immune from liability. These principles, of course, are inapplicable where the injury is divisible and the causation of each part can be separately assigned to each tortfeasor.

Id. at 260 n.8 (internal quotation marks and citations omitted).[6]

Common law courts have long applied joint and several liability in a variety of contexts where multiple perpetrators cause indivisible harm. *See Restatement* § A18, Reporters' Note cmt. a ("Many courts, even be-

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[6] The discussion of contribution in *Edmonds* was relevant in the context of the negligence issue in that case; contribution actions are generally unavailable to intentional tortfeasors. *See infra* p. 26.

fore the 20th century, imposed joint and several liability on independent tortfeasors when their acts caused truly indivisible harm."). For example, where several entities emptied crude oil into a creek, which thereafter ignited and burned plaintiff's farm, each was jointly and severally liable for the entire damage. *See Northup* v. *Eakes*, 178 P. 266, 268 (Okla. 1918). Where two motorcyclists independently and simultaneously scared plaintiff's horse, resulting in injury to plaintiff, each was jointly and severally liable for the entire injury. *See Corey* v. *Havener*, 65 N.E. 69, 69 (Mass. 1902) ("It makes no difference that there was no concert between them, or that it is impossible to determine what portion of the injury was caused by each. If each contributed to the injury, that is enough to bind both."). Similarly, multiple defendants who independently discharged pollutants into the air thereby creating a nuisance to plaintiffs were held jointly and severally liable for the entire damages claimed. *See Michie* v. *Great Lakes Steel Div., Nat'l Steel Corp.*, 495 F.2d 213, 218 (6th Cir. 1974).

The rule has continuing vitality. Defendants in suits under 42 U.S.C. § 1983 are generally held jointly and severally liable for indivisible injuries. *See Thomas* v. *Cook Cnty. Sheriff's Dep't*, 604 F.3d 293, 311 (7th Cir. 2009) (en banc) (where "defendants were jointly and severally liable, ... allocating damages between the parties for the single indivisible injury alleged in this case was improper"); *Weeks* v. *Chaboudy*, 984 F.2d 185, 188-189 (6th Cir. 1993) (holding based on *Edmonds* that the rule of joint and several liability constituted "federal rule" of damages allowing recovery of "full damages" from defendant regardless of "the actions of concurrent tortfeasors"). And many courts applying state law continue to impose joint and several liability for indivisible

injuries.[7] *See, e.g., Bass* v. *General Motors Corp.*, 150 F.3d 842, 850 (8th Cir. 1998) (applying indivisible injury rule under Missouri law to hold car manufacturer jointly and severally liable with negligent driver who struck plaintiff); *Carrozza* v. *Greenbaum*, 916 A.2d 553, 565 (Pa. 2007) ("Joint and several liability as a principle of recovery for an indivisible injury caused by multiple tortfeasors lies at the very heart of the common law of tort, and also has a solid foundation in Pennsylvania's statutory law.").

The harm Amy suffers is plainly indivisible. There is no practical way to divide up the trauma of a victim of child abuse images and to assign aspects of her trauma to various defendants. Nor is it possible to divide pecuniary losses resulting from that trauma. Amy does not spend the first five minutes of psychological therapy on individual *x* who might have viewed her images and the next five discussing individual *y*. *Cf. Burgess*, 684 F.3d at 461 (Gregory, J., concurring and dissenting in part, concurring in the judgment) ("I do not believe that a fact finder could meaningfully say precisely *x* amount of Vicky's psychological injuries were caused by Burgess's watching the video, that *y* amount was caused by Defendant # 2's watching the same vid-

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[7] As the Court noted in *Norfolk & Western Railway Co.* v. *Ayers*, 538 U.S. 135 (2003), although some states have come to favor apportionment schemes based on comparative fault, "many States retain full joint and several liability, even more retain it in certain circumstances, and most of the recent changes away from the traditional rule have come through legislative enactments rather than judicial development of common-law principles." *Id.* at 164-165 (citing *Restatement* § 17, Reporters' Note, tables, at 151-152, 153-159, § B18, Reporters' Note). In *Norfolk*, the Court held that the Federal Employers Liability Act, 42 U.S.C. §§ 51-60, did not mandate apportionment among multiple defendants in part because joint and several liability is "the traditional rule." 538 U.S. at 163.

eo, and so on."). Traditional tort principles thus provide for Amy to recover her full damages from any defendants who viewed or traded in images of her abuse, for they are jointly and severally liable for her harm.

The Government's principal contention (U.S. Br. 43) is that § 2259 does not *require* this approach—even though this Court generally presumes that Congress has legislated against the backdrop of relevant common law principles. *See Samantar*, 560 U.S. at 320 n.13. But the Government also contends that joint and several liability does not apply because a victim's harm is divisible "in *theory* (i.e., to the eye of omniscience)," though it may be "hard or perhaps impossible on the facts" to actually perform the division. U.S. Br. 44 n.17 (internal quotation marks omitted).

The Government's contention that the harm is divisible "in theory" is not a ground to reject joint and several liability. Tort law authorities make clear that an injury must be *practically* divisible for individual allocation of liability. *See* Dobbs et al., *The Law of Torts* § 192, at 643 (2d ed. 2011) (Dobbs) (indivisible injuries are those that cannot be "separated in any practical way"); Harper § 10.1, at 6 ("[T]he harm caused here must be of an indivisible nature that is not practically apportionable."); *Prosser & Keeton* § 52, at 347 (indivisible injuries are those "incapable of any reasonable or practical division"). The possibility of division "in *theory*" (U.S. Br. 44 n.17) is simply irrelevant. *See Restatement* § A18, Reporters' Note cmt. a (historically joint and several liability has been imposed "whether the injury was one that was truly indivisible (such as two vehicles colliding and breaking the plaintiff's leg) or was theoretically divisible, but, because of problems of proof, could not be apportioned based on the causal roles of

each defendant (e.g., marauding cattle belonging to several defendants who destroy a field of crops)").

In any event, Amy's injuries cannot be reduced—even theoretically—to atoms of psychological trauma. Her harm is not an agglomeration of various discrete injuries, piled one upon another by successive perpetrators. The injury Amy has suffered, caused by the knowledge that images of her abuse are impossible to contain and continue to be viewed again and again, and the significant losses she has sustained as a result are no more theoretically "divisible" than death, brain damage, or the total destruction of a building. *Cf. Richardson* v. *Volkswagenwerk, A.G.*, 552 F. Supp. 73, 84 (W.D. Mo. 1982) (finding brain damage, broken bones and paraplegia indivisible as a matter of law); Harper § 10.1, at 22 (Indivisibility "can mean that the harm is not even theoretically divisible (as death or total destruction of a building)"); *Prosser & Keeton* § 52, at 347 (describing death, "a broken leg or any single wound," and "the destruction of a house by fire" as indivisible injuries). Here, as in those cases, "[n]o ingenuity can suggest anything more than a purely arbitrary apportionment of such harm." *Prosser & Keeton* § 52, at 347. The Government's argument invites just such arbitrariness, and offers no practical mechanism to tie the (theoretical) elements of a victim's harm to particular defendants. Any rule that relies on the courts' "omniscience" is unworkable.

B. Joint And Several Liability Is Appropriate Given The Harm A Defendant Causes A Victim of Abuse Images

The Government and Petitioner also suggest that joint and several liability is inappropriate because Petitioner did not cause the *entirety* of Amy's harm. *See*

U.S. Br. 46 (defendant should not be held "responsible for losses he indisputably did not cause"); Pet. Br. 50.

This argument erroneously conflates whether a defendant has *caused* a victim's injury with whether the victim's damages can be *allocated* to particular defendants. As explained *supra* pp. 5-13, under basic tort law principles, each perpetrator, by viewing these abuse images of Amy, has caused her injuries. And when a victim suffers such an indivisible injury, "each tortfeasor is treated as a cause of the *entire* indivisible injury." Dobbs § 192, at 643 (emphasis added); *see also Prosser & Keeton* § 52, at 345 (where there is no basis for division, "courts generally hold the defendant for the entire loss, notwithstanding the fact that other causes have contributed to it").[8] Joint and several liability is thus appropriate precisely *because* the law deems each perpetrator a cause of the *entire* injury.

The Government nevertheless claims that the fact that "others have engaged in the same wrongful conduct" as the defendant "does not justify holding a defendant (like petitioner) responsible for losses he indisputably did not cause." U.S. Br. 47; *see also* Pet. Br. 50

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[8] Judge Gregory of the United States Court of Appeals for the Fourth Circuit appropriately captured the distinction between causation and apportionment of damages:

> The common law holds joint tortfeasors jointly and severally liable for indivisible damages. ... Thus, the restitution question is resolved by asking whether Burgess proximately caused Vicky harm. Assuming that he did, the court must then consider whether those injuries are divisible from the injuries caused by the other offenders who also proximately harmed Vicky. If they are indivisible, then Burgess must be held jointly and severally liable for those injuries.

Burgess, 684 F.3d at 461.

(Amy has not shown that "her losses or damages result from her knowledge of Paroline's conduct"). As an initial matter, the Government's claim is difficult to reconcile with its other arguments—namely, that causation should be analyzed based on the defendants' aggregate conduct because "Amy's trauma cannot be subdivided in the way a traditional 'but-for' standard would require" and because "it is practically impossible to know whether her losses would have been slightly lower if one were to subtract one defendant, or ten, or fifty." U.S. Br. 25.

But even so, the Government (and Petitioner) get the issue exactly backward. Of course a tortfeasor may be held responsible only for injuries he or she has caused. But "[a] defendant's individual full responsibility for an injury that was an actual and proximate result of her tortious behavior is not diminished if some other person's tortious behavior also was an actual and proximate cause of the injury." Wright, *The Logic and Fairness of Joint and Several Liability*, 23 Memphis St. U. L. Rev. 45, 54-55 (Dec. 1992); *see also* Prosser, *Joint Torts and Several Liability*, 25 Cal. L. Rev. 413, 432 (1937) ("Where the acts of two defendants combine to produce a single result, which is incapable of being divided or apportioned—such as the death of the plaintiff—each may be the proximate cause of the loss, and each may be held liable for the entire damage."). The contrary rule—suggested by the Government—could "subject plaintiffs to a perverse 'tortfest,' in which the more tortfeasors there were, the less liable each would be, although the tortious behavior of each defendant remained constant and was an actual and proximate cause of the plaintiff's entire injury." Wright, 23 Memphis St. U. L. Rev. at 57.

That is not the law. Rather, courts regularly apply joint and several liability where multiple tortfeasors cause an indivisible injury. *See, e.g.*, *Bass*, 150 F.3d at 850 (holding car manufacturer jointly and severally liable for plaintiff's "total injuries" with unidentified driver who hit plaintiff because manufacturer's defective design contributed to plaintiff's damages); *Kudlacek* v. *Fiat S.p.A*, 509 N.W.2d 603, 612 (Neb. 1994) ("[I]f the separate and independent acts of negligence by different persons combine to produce a single injury, each participant is liable for the damage, although one of them alone could not have caused the result."); *Northup*, 178 P. at 268 ("Where, although concert is lacking, the separate and independent acts or negligence of several combine to produce directly a single injury, each is responsible for the entire result, even though his act or neglect alone might not have caused it." (internal quotation marks omitted)); *Warren*, 92 N.Y.S. at 728 (holding defendants jointly and severally liable even though "no one defendant caused" the entire injury).

C. The Rule of Joint and Several Liability Applies With Even Greater Force Here Because Perpetrators of Child Abuse Images Intentionally Engage In Wrongful Conduct

Generally, "[a]n actor who intentionally or recklessly causes harm is subject to liability for a broader range of harms than the harms for which that actor would be liable if only acting negligently." *Restatement* § 33(b). The rationale for broader liability for intentional tortfeasors is straightforward: because proximate cause is in part "employed to prevent a defendant's liability from being out of proportion with the tortfeasor's culpability, the scope of liability for intentional and reckless tortfeasors should be broader than for negligent or

strictly liable tortfeasors." *Id.* § 33 cmt. a.[9]; *see also Shades Ridge Holding Co.* v. *Cobbs, Allen & Hall Mortg. Co.*, 390 So. 2d 601, 609 (Ala. 1980) ("This trend [toward extended liability for intentional torts] is dictated by the policy that liability even though potentially tremendous should be imposed on the wrongdoer rather than the victim be uncompensated. Hence, even very remote causation may be found where the defendant acted intentionally."); *Seidel* v. *Greenberg*, 260 A.2d 863, 873 (N.J. Super. Ct. Law. Div. 1969) ("many of the limitations upon liability ... under the doctrine of 'proximate cause,' as usually expounded in negligence cases *do not apply to intentional torts*." (emphasis added)); *State for Use & Benefit of Richardson* v. *Edgeworth*, 214 So. 2d 579, 587 (Miss. 1968) ("A higher degree of responsibility is imposed upon a wrongdoer whose conduct was intended to cause harm than upon one whose conduct was negligent.").

Similarly, it is appropriate and reasonable to hold an intentional tortfeasor jointly and severally liable for the consequences of his conduct. *See Restatement* § 12 ("Each person who commits a tort that requires intent is jointly and severally liable for any indivisible injury legally caused by the tortious conduct."); *see id.* ("Intentional tortfeasors have been held jointly and severally liable since at least the decision in *Merryweather* v. *Nixan*, 101 Eng. Rep. 1337 (1799)"). This principle applies even where a jurisdiction has modified the tradi-

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[9] Factors influencing this broadened scope of liability may include "the moral culpability of the actor, as reflected in the reasons for and intent in committing the tortious acts, the seriousness of harm intended and threatened by those acts, and the degree to which the actor's conduct deviated from appropriate care." *Restatement* § 33(b). Petitioner's moral culpability is substantial, and the seriousness of the harm he caused is undeniable.

tional rule for *nonintentional* tortfeasors. *See id.* § 12 cmt. a. Indeed, the *Restatement* observes that "[n]ot a single appellate decision has been found that stands for the proposition that joint and several liability of intentional tortfeasors has been abrogated or modified." *Id.* Reporters' Note cmt. b.

D. Joint And Several Liability Properly Requires The Defendants, Rather Than The Victim, To Bear The Burden Of Defendants' Wrongdoing

The traditional rule of joint and several liability for indivisible injuries properly "places any hardship resulting from the difficulty of apportionment on the proven wrongdoer and not on the innocent plaintiff." *Lovely* v. *Allstate Ins. Co.*, 658 A.2d 1091, 1093 (Me. 1995). The multiple perpetrators who jointly (and intentionally) create the conditions that injure the victim must bear the burden of absolving themselves of any portion of responsibility. *Cf. Summers* v. *Tice*, 199 P.2d 1, 4 (Cal. 1948) (Defendants "brought about a situation where the negligence of one of them injured the plaintiff, hence it should rest with them each to absolve himself if he can. The injured party has been placed by defendants in the unfair position of pointing to which defendant caused the harm. If one can escape the other may also and plaintiff is remediless.")

These principles apply with particular force in light of Amy's statutory entitlement to restitution. Congress passed § 2259 to ensure that victims such as Amy recover "the full amount" of their losses. 18 U.S.C. § 2259(b)(1). "The historical policy decision to shift the burden of insolvency from tort plaintiffs to defendants fits perfectly with the statutory goal of fully compensating victims of child pornography." *United States* v. *Hargrove*, 714 F.3d 371, 378 (6th Cir. 2013) (Clay, J.,

concurring in part and in the judgment). It is the congressional policy of § 2259, understood in light of background common law principles, that as between Amy and Petitioner, Petitioner must bear the risk of shouldering Amy's losses. Amy has shown, in this case, that her damages amount to $3,367,854, and she should be entitled to collect that sum from any and all defendants with the ability to pay. *See* Resp't Amy Br. 63. As between the victim and the intentional criminal actor, it is perfectly appropriate to impose the burden of bearing those damages on Petitioner and on any other defendants who participate in trafficking and viewing images of Amy's abuse.

The Petitioner's proposal is unworkable, and the Government's proposed alternative of ad-hoc apportionment would almost certainly result in Amy and other victims recovering much less than the "full amount" of their losses. 18 U.S.C. § 2259(b)(1). Victims could be consigned, endlessly, to seeking to collect small-dollar amounts from potentially hundreds of defendants, many of whom may have no ability to pay. The ad-hoc approach also invites unpredictable, disparate, and arbitrary restitution orders. Lower courts have already struggled mightily to adopt consistent restitution formulas under § 2259, to little avail. *Compare, e.g.*, *Benoit*, 713 F.3d at 22 (rejecting approach of dividing victim's total claimed losses by the number of outstanding restitution judgments) *with United States* v. *Lundquist*, 731 F.3d 124, 138-140 (2d Cir. 2013) (affirming in part district court's order dividing Amy's losses by the number of persons convicted of possessing her images); *Hargrove*, 714 F.3d at 375 (indicating that dividing losses by convicted possessors is acceptable in some cases).

These alternatives are also sure to produce capricious results divorced from any actual losses incurred by victims. In at least one case, the Government urged the district court to multiply the number of images in the defendant's possession by an arbitrary dollar value—a calculation that bears no apparent connection to a victim's harm. *See United States* v. *Kennedy*, 643 F.3d 1251, 1264 (9th Cir. 2011). Nor is it an easy matter to allocate, as the Government suggests, restitution "based on the individual defendant's *relative* contribution" to a victim's losses. U.S. Br. 48 (emphasis added). Determining in any meaningful sense a defendant's "relative" contribution is impossible for indivisible injuries such as Amy's. Even in theory, determining a "relative" contribution would require knowledge of other perpetrators' 'contribution' to a victim's harm. But all of Amy's victimizers have not been identified, and the network of perpetrators grows each day. Since January 2006 alone Amy has received more than 1,800 notices of a new federal criminal case involving images of her sexual exploitation. *See* Resp't Amy Br. 57.

The Government suggests that joint and several liability is inappropriate because contribution actions may be unavailable and would be "clumsy" in any event. U.S. Br. 45. But contribution actions are *normally* unavailable to intentional tortfeasors, and yet joint and several liability remains the general rule. *See Musick, Peeler & Garrett* v. *Employers Ins. of Wausau*, 508 U.S. 286, 297 (1993) ("The course of tort law in this century has been to reverse the old rule against contribution, but this movement has been confined in large part to actions in negligence." (citing Harper § 10.2, at 42 and n.10)). In any event, the potential unavailability of contribution does not vitiate joint and several liability, which is designed to ensure a vic-

tim's full recovery and to shift the burden of any shortfall to the tortfeasor. *See Edmonds*, 443 U.S. at 260 n.8 ("A concurrent tortfeasor generally may seek contribution from another, but he is not relieved from liability for the entire damages even when the nondefendant tortfeasor is immune from liability.") (citation omitted); *Rivera* v. *Gerner*, 446 A.2d 508, 535 (N.J. 1982) ("If one defendant were insolvent or bankrupt, a second joint tortfeasor might be liable for the total amount of the judgment.... [T]his rule operates to provide the injured person with full recovery.").

Finally, despite the Government's and Petitioner's claims to the contrary, *see* U.S. Br. 45; Pet. Br. 54, any complications of joint and several liability pale in comparison to the administrative difficulties of an ad hoc restitution scheme. The rule of joint and several liability is anchored in common law tradition, and courts are no stranger to the rule in other contexts. *See, e.g.*, 42 U.S.C. § 9607(a) (imposing joint and several liability under CERCLA). Petitioner's approach, on the other hand, could leave victims without any recovery. And the Government's approach would require district courts to continue to feel their way blindly through the pitfalls of improvised allocation schemes. Both approaches would leave victims like Amy without the "full" restitution mandated by § 2259.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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NOVEMBER 2013

APPENDIX

APPENDIX

LIST OF AMICI CURIAE

The **National Crime Victim Law Institute** (NCVLI) is a nonprofit educational organization located at Lewis & Clark Law School in Portland, Oregon. NCVLI's mission is to actively promote balance and fairness in the justice system through crime victim-centered legal advocacy, education, and resource sharing. NCVLI accomplishes its mission through education and training; technical assistance to attorneys; promotion of the National Alliance of Victims' Rights Attorneys; research and analysis of developments in crime victim law; and provision of information on crime victim law to crime victims and other members of the public. In addition, NCVLI actively participates as amicus curiae in cases involving crime victims' rights nationwide.

Arizona Voice for Crime Victims (AVCV) is an Arizona nonprofit corporation that works to promote and protect crime victims' interests throughout the criminal justice process. To achieve these goals, AVCV empowers victims of crime through legal advocacy and social services. AVCV also provides continuing legal education to the judiciary, lawyers, and law enforcement. AVCV seeks to foster a fair justice system which provides crime victims with resources and information to help them seek immediate crises intervention; informs crime victims of their rights under the laws of the United States and Arizona; ensures that crime victims fully understand their rights; and promotes meaningful ways for crime victims to enforce their rights, including through direct legal representation.

Child Justice is a national organization that advocates for the safety, dignity and self-hood of abused, neglected and at-risk children. The mission of Child Justice, Inc. is to protect and serve children in cases where child sexual, physical abuse or domestic violence is present. It works with local, state and national advocates, legal and mental health professionals, and child welfare experts to defend the interests of affected children. It provides public policy recommendations, community service referrals, court watching services, research and education. Child Justice also serves important public interests by securing pro bono representation for protective parents in financial distress and by seeking appropriate judicial solutions to the threats facing abused, neglected and at-risk children. Child Justice is keenly aware of the financial impact of childhood victimization, particularly when that victimization continues through images, and recognizes full financial restitution from perpetrators is critical to victim recovery.

The **Maryland Crime Victims' Resource Center, Inc.** (MCVRC) is a nonprofit organization dedicated to serving the interests of crime victims. Its mission is to ensure that victims of crime receive justice and that they are treated with dignity and compassion. Its diversified services include criminal justice education, court accompaniment, counseling, support groups, legal information and representation, and policy advocacy. MCVRC has represented crime victims regarding restitution and other victims' rights in Maryland and federal courts.

The **National Center for Victims of Crime** (National Center), a nonprofit organization based in Washington, DC, is the nation's leading resource and advocacy organization for all victims of crime. The mission of the National Center is to forge a national commitment to help victims of crime rebuild their lives. Dedicated to serving individuals, families, and communities harmed by crime, the National Center, among other efforts, advocates laws and public policies that create resources and secure rights and protections for crime victims. The National Center is particularly interested in this case because of its commitment to victims of childhood sexual abuse and child pornography.

The **National Organization for Victim Assistance** (NOVA) is the oldest organization of its kind in the United States and quite possibly in the world. Since 1975, NOVA has been dedicated to championing dignity and compassion for those harmed by crime and crisis. NOVA is a node in a network of 14,000 allied professional and volunteer victim advocates and crisis responders and also receives 6,000 victim assistance calls through a nationwide toll-free victim assistance line. NOVA recognizes the harm done by criminal offenders and affirms the enforcement of accountability and responsibility through court-ordered restitution provided to the victim by the convicted perpetrator.

AMICUS CURIAE BRIEF

No. 12-8561

In The Supreme Court of the United States

DOYLE RANDALL PAROLINE,

Petitioner,

vs.

AMY UNKNOWN and UNITED STATES,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR AMICUS CURIAE THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF RESPONDENT AMY

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QUESTION PRESENTED

What, if any, causal relationship or nexus between the defendant's conduct and the victim's harm or damages must the government or the victim establish in order to recover restitution under 18 U.S.C. §2259?

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The National District Attorneys Association is the oldest and largest professional organization representing criminal prosecutors in the world. Its members come from the offices of district attorneys, state's attorneys, attorneys general, and county and city prosecutors with responsibility for prosecuting criminal violations in every state and territory of the United States. Its purposes are:

> (1) To foster and maintain the honor and integrity of the prosecuting attorneys of the United States in both large and small jurisdictions by whatever title such attorneys may be known;

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[1] On September 3, 2013, Counsel for Respondent, Amy Unknown, filed a consent to the filing of amicus curiae briefs, in support of either party or of neither party. On September 6, 2013, Counsel for Respondent, Wright, filed a consent to the filing of amicus curiae briefs, in support of either party or of neither party. On September 6, 2013, Counsel for Respondent, United States, filed a consent to the filing of amicus curiae briefs, in support of either party or of neither party. On September 6, 2013, Counsel for Petitioner, Paroline, filed a consent to the filing of amicus curiae briefs, in support of either party or of neither party. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than the Amici or their counsel made a monetary contribution to this brief's preparation or submission.

(2) To improve and to facilitate the administration of justice in the United States;

(3) To promote the study of the law and legal research, the diffusion of knowledge and the continuing education of prosecuting attorneys, lawyers, law enforcement personnel, and other members of the interested public by various means including, but not limited to, arranging conferences and fostering periodic meetings for the discussion and solution of legal problems affecting the public interest in the administration of justice; and

(4) To cause to be published and to distribute articles, reports, monographs, and other literary works on legal subjects or other related subjects;

(5) To provide to state and local prosecutors the knowledge, skills and support to ensure that justice is done and the public safety and rights of all are safeguarded.

The mission of the National District Attorneys Association is to be the voice of America's prosecutors and to support their efforts to protect the rights and safety of the people. Prosecutors across the nation deal with cases where child sexual assault and molestation are photographed, circulated, and perpetuated (sometimes referred to as "child pornography"). They also deal with victim restitution issues on a broad scale. The issues in this case concerning what causal relationship may be required for the mandatory

restitution provision of 18 U.S.C. §2259 directly involve both of these prosecutorial concerns.

SUMMARY OF THE ARGUMENT

Images of child sexual abuse are purposefully and intentionally transferred traded and possessed by a vast network of like-minded criminals, who achieve sexual gratification from these atrocities captured on digital media. The advancement in technology allows for both anonymity and ease with regard to the online movement of these images. The proliferation of these abusive images via the Internet creates repeated harm to the victims of these child abuse images. The mandatory restitution provision of 18 U.S.C. §2259 allows victims, like Amy, to recover the "full amount" of her losses from those criminals who possess her sexual abuse images. Petitioner plead guilty to the possession of *inter alia*, images of Respondent Amy's sexual abuse. Amy is therefore entitled to recover the full amount of her losses from Petitioner. This court should affirm the Fifth Circuit's *en banc* opinion.

ARGUMENT

I. CHILD PORNOGRAPHY IS NOT "KIDDIE PORN," NOR IS IT "PORNOGRAPHY." IT IS A CRIME SCENE DISPLAYING THE SEXUAL ABUSE AND EXPLOITATION OF CHILDREN CAPTURED IN TIME AND EXISTING IN PERPETUITY.

The term most often used to describe the criminal acts of producing, distributing, possessing, or receiving images depicting the sexual assault and exploitation of children is "child pornography." This word, at best, fails to accurately describe the atrocities caught on camera, and at worst provides a mechanism to normalize these repulsive acts. Professionals in the field assign a more accurate name, calling them child abuse images. "Child pornography is unrelated to adult pornography, it clearly involves the criminal depiction and memorializing of the sexual assault of children and the criminal sharing, collecting, and marketing of the images."[2] If we begin with an accurate name for this behavior, then we are more apt to not be fooled when criminals argue that they "simply possessed two images."[3] Congress has underscored the very real harm of possessing these child abuse images in its findings of the Adam Walsh Child Protection and Safety Act of 2006 by stating "every instance of

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[2] U.S. Dep't of Justice, *The National Strategy for Child Exploitation Prevention and Interdiction: A Report to Congress* (2010).

[3] Pet. Br. 26, note 17.

viewing images of child pornography represents a renewed violation of the privacy of the victims and a repetition of their abuse."[4]

A. The Proliferation of Child Abuse Images Has a Deleterious Effect on its Victims, One of Which Congress has Sought to Remedy to the Extent Money can do so.

18 U.S.C. §2259 is designed to provide restitution for victims, like Amy, who suffer continued exposure and abuse at the hands of those, like Petitioner, who purposefully whet their sexual appetites with her sexual abuse images.[5] As the *en banc* Fifth Circuit noted, the language "reflects a broad restitutionary purpose."[6] While money is a poor method of attempting to make one, like Amy, whole; it is the only mechanism which comes close. The restitution victims receive helps pay for a host of expenses which Congress has recognized as being directly related to the injuries caused.[7]

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[4] Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, §501(2)(D), 120 Stat. 623.

[5] *See also*, *United States v. Laney*, 189 F.3d 954, 966 (9th Cir. 1999). "Section 2259 is phrased in generous terms, in order to compensate the victims of sexual abuse for the care required to address the long term effects of their abuse."

[6] *In re Amy Unknown*, 701 F.3d 749, 752 (5th Cir. 2012) (*en banc*).

[7] 18 U.S.C. §2259(b)(3)(A)-(F).

B. The Link Between Possession of Child Abuse Images and Sexually Abusing Children is Strong.

A 2008 study compared inmates convicted of possession, receipt, or distribution of child abuse images but having no reported history of hands-on child sexual abuse (74% of the group) and those convicted of possession, receipt, or distribution of child abuse images and who had a known history of hands-on child sexual abuse (26% of the group).[8] The goal of the study was to determine if those with no history of hands-on offenses were "merely" collectors of these images.[9] The inmates were participating in an intensive residential sex offender treatment program, and the results were based on self-reporting. The results showed that by the end of the treatment, 85% of the group admitted to having at least one hands-on sexual offense (an increase of 59% from the known hands-on offenders).[10] Those who ultimately admitted to committing hands-on sexual abuse but

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[8] Michael L. Bourke & Andres E. Hernandez, *The 'Butner Study' Redux: A Report of the Incidence of Hands-on Child Victimization by Child Pornography Offenders*, 24 J. Fam. Violence 183 (2009). *See also*, U.S. Sentencing Commission, Report to Congress, Ch. 4 (December 2012), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Sex_Offense_Topics/201212_Federal_Child_Pornography_Offenses/Chapter_04.pdf.

[9] *Id.*

[10] *Id.* at 187.

who had no known prior history, also admitted to having an average of 8.7 victims each.[11]

Findings from the second wave of the National Juvenile Online Victimization Study found that many arrests made for possession of child pornography involved "dual offenses . . . of possession . . . and child sexual victimization were detected in the course of the same investigation."[12] Child Protective Service Agencies also know enough to react when child pornography is found in a home which also has children. For instance, The Dallas Morning News reports that in the spring of 2007 Petitioner Paroline and his wife were in the process of adopting two toddler sisters, one of which was a prior victim of sexual assault.[13] Upon being notified of Petitioner's arrest by the FBI for possession of these child sexual abuse images "Texas Child Protective Services ordered the [adoption] agency to take the two sisters."[14]

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[11] *Id.*

[12] National Center for Missing and Exploited Children: *Child Pornography Possessors Arrested in Internet-Related Crimes – Findings from the National Juvenile Online Victimization Study*, Page 16, *available at* http://www.missingkids.com/en_US/publications/NC70.pdf (last visited October 17, 2013).

[13] Lee Hancock, The Dallas Morning News, *In just a few clicks of child porn, several lives are ruined*, November 28, 2010, *available at* http://www.dallasnews.com/news/state/headlines/20101128-In-just-a-few-clicks-of-5077.ece?nclick_check=1 (last visited November 14, 2013).

[14] *Id.*

The Child Exploitation and Obscenity (CEOS) section of The Department of Justice has also argued that "whether there is a causal connection or even a correlation between child pornography and child molestation, those who collect child pornography exploit and victimize the children in those images, and create a demand for the production of more child pornography regardless of whether they have ever personally molested a child."[15] Indeed, this Court has also described the impact child abuse images have on its victims.[16] Lastly, possessors of these abusive images not only use them for sexual gratification. Such images are also as a tool to groom children in order "to break down the child's barriers to sexual behavior, ..."[17] Congress has commented on this link finding that "child pornography is often used as part of a method of seducing other children into sexual activity; a child who is reluctant to engage in sexual

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[15] Alexandra Gelber, *Response to* "A Reluctant Rebellion," U.S. Dep't of Justice, 6 (2009), *available at* http://www.ussc.gov/Education_and_Training/Annual_National_Training_Seminar/2010/009c_Reluctant_Rebellion_Response.pdf (last visited October 17, 2013).

[16] "A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography. . . . It is the fear of exposure and the tension of keeping the act secret that seem to have the most profound emotional repercussions." *New York v. Ferber*, 458 U.S. 747, 759 n.10 (1982).

[17] Candace Kim, *From Fantasy to Reality: The Link Between Viewing Child Pornography and Molesting Children*, APRI Update Volume 1, Number 3 (2004).

activity with an adult, or to pose for sexually explicit photographs, can sometimes be convinced by viewing depictions of other children 'having fun' participating in such activity."[18]

America's prosecutors are also acutely aware of the link between possession of these images and the physical sexual abuse of children. This is why the prosecution of possession of these images is crucial to defeat the market creation for these images, and to keep children safe.

II. ADVANCEMENTS IN TECHNOLOGY ALLOW LIKE MINDED CRIMINALS TO COLLECTIVELY AND KNOWINGLY CREATE A VAST MARKETPLACE FOR THE ENJOYMENT AND PERPETUATION OF THE SEXUAL ABUSE AND EXPLOITATION OF CHILDREN.

The advancement of technology has done much to improve our nation, and the Internet is no exception. We are a far cry from the early days of dial-up technology which required significant patience to upload, download or even perform a routine search, and at a maximum, meager download speed of 64 kilobits per second.[19] Today's technology can achieve Internet

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[18] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 104-208, §121, 110 Stat. 3009-26.

[19] Federal Communications Commission, Communications History, *available at* http://www.fcc.gov/omd/history/internet/making-connections.html (last visited November 14, 2013).

download speeds in excess of 35 megabits per second.[20] In addition to faster internet service, the Internet itself allows for almost complete anonymity. With the exception of capturing an Internet Protocol (IP)[21] address and the ability to trace that IP to a particular location and user, there is very little identifying information necessary to search, upload, or download child abuse images. The anonymity afforded to Internet users creates two problems as they relate to the field of child abuse images: First, it allows those who achieve sexual gratification from looking at child abuse images the opportunity to engage with other likeminded criminals without the need to expose their real identity. They create and maintain a network of anonymous cohorts which exists for the purpose of furthering their criminal and deviant choices. Second, law enforcement professionals must continually try to outsmart the anonymous criminal by ferreting out who among them is searching for or allowing the download/transfer of child abuse images, and via which technology. Thus, law enforcement conducts

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[20] Ken Burnside, Radio Shack, Tech Channel, *available at* http://techchannel.radioshack.com/fastest-internet-service-available-2657.html (last visited November 14, 2013).

[21] "An Internet Protocol is a set of rules that govern Internet activity and facilitate completion of a variety of actions on the World Wide Web. Therefore an Internet Protocol address is part of the systematically laid out interconnected grid that governs online communication by identifying both initiating devices and various Internet destinations, thereby making two-way communication possible," *available at* http://whatismyip address.com/ip-address (last visited November 14, 2013).

massive scale operations to find and then ultimately track these criminals.[22]

The use and advancement of technology allows many avenues in which criminals can search for and offer up child abuse images using the Internet. Following are explanations of the most typical methods used by criminals to acquire and share child abuse images.

A. Peer-to-Peer Networks (P2P)

Peer-to-Peer networks (P2P) are rapidly increasing as a means to acquire and offer child abuse images. A report to Congress in 2003 observed that, of the avenues in which crimes are reported to the National Center for Missing and Exploited Children (NCMEC) via their CyberTipline, P2P networks made up approximately 1%.[23] However, in a 2010 report to Congress analyzing Operation Roundup and FairPlay data, more than 20 million unique IP

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[22] Two major law enforcement tools used to identify individual IP addresses and catalog suspected child abuse images include Operation Fairplay, developed in 2006 and supported by the Wyoming Division of Criminal Investigations and the Palm Beach County State's Attorney Office; and Operation Roundup, developed in 2009 by the University of Massachusetts under a grant from the National Institute of Justice.

[23] *File Sharing Programs: Child Pornography is Readily Accessible Over Peer to Peer Networks*, Testimony before the H. Comm. on Gov't Reform, United States General Accounting Office, GAO-03-537T (statement of Linda D. Koontz, Director, Information Management Issues), 10 (March 13, 2003).

addresses were associated with offering child abuse images via P2P networks.[24]

There are two model types of P2P networks; the centralized and decentralized models.[25] The centralized model creates a database of all the files available for sharing by its users (those connected to the network). When one user enters a search term, the server acts as a pointer and directs the requester to another user who has the available file (sharer). The user then connects directly with the sharer in order to transfer the file.[26] One issue with this model is that the owner of the server/broker is locatable and ultimately vulnerable to litigation. This was evidenced in the court proceedings and subsequent take down of the most well-known centralized Peer-to-Peer network, Napster.[27]

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[24] U.S. Dep't of Justice, *The National Strategy for Child Exploitation Prevention and Interdiction: A Report to Congress*, 12 (August 2010).

[25] *File Sharing Programs: Child Pornography is Readily Accessible Over Peer to Peer Networks*. Testimony before the H. Comm. on Gov't Reform, United States General Accounting Office, GAO-03-537T (statement of Linda D. Koontz, Director, Information Management Issues), 15-20 (March 13, 2003).

[26] *Id.*

[27] *A&M Records Inc. v. Napster Inc.*, 239 F.3d 1004 (9th Cir. 2001). *See also*, Sergeant Josh Moulin, *What Every Prosecutor Should Know About Peer-to-Peer Investigations*. Child Sexual Exploitation Program Update Volume 5, Number 1, 2010. National District Attorneys Association, National Center for Prosecution of Child Abuse.

The decentralized model is the most used model, because unlike the centralized model, it does not store the filenames of its users. This model begins with connected users operating on the same network using the same protocol. While there are many protocols available, the Gnuetella network/protocol is the most well-known,[28] while BitTorrent is the most popular amongst today's users.[29] When a user connects to the network, he is either identified as an ultrapeer or a node (also called a leaf).[30] The ultrapeer typically has faster internet connections, is not hindered by a firewall, and generally has a history of stable connections.[31] Ultrapeers keep the network running fast by being responsible for many nodes. They are also connected to other ultrapeers. Before a user can search for and download files, he must install client

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[28] In addition to the Gnutella network, there are many others such as: eDonkey, eMule, KaZaa, LimeWire, Shareaza, Bearshare and others.

[29] Hyunggon Park, et al. Peer-to-Peer Networks – Protocols, Cooperation, and Competition, 1, *available at* http://medianetlab.ee.ucla.edu/papers/chapter_P2P_hpark.pdf.

[30] Matei Ripeanu, et al. *Mapping the Gnutella Network: Properties of Large Scale Peer-to-Peer Systems and Implications for System Design*, 3, *available at* http://people.cs.uchicago.edu/~matei/PAPERS/ic.pdf (last visited November 14, 2013).

[31] Sergeant Josh Moulin, *What Every Prosecutor Should Know About Peer-to-Peer Investigations*. Child Sexual Exploitation Program Update Volume 5, Number 1, 2010. National District Attorneys Association, National Center for Prosecution of Child Abuse, *available at* http://www.ndaa.org/pdf/UpdateGreen_v5.pdf (last visited November 14, 2013).

software which is compatible with the network being used. The software is easily customized by the user and allows him to determine which files he is willing to share, how many nodes can download from him at any particular time, and for how long he will allow his files to be accessed by other nodes.[32] When a user on the network searches for a potential file to be downloaded, he usually inputs search terms into the query field, similar to how one uses a search engine like Google, or Yahoo. The search terms are then sent to all available nodes, and any matching files/ directories are sent back to the requester with the information on where the requester can retrieve them.[33] The user can then directly connect with any one peer to download a file, or download pieces of the same file from multiple peers. Because each file has a unique digital fingerprint known as a hash value,[34] the user can be certain he has downloaded the complete file (even if piecemealed together from multiple

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[32] *Id.*

[33] *File Sharing Programs: Child Pornography is Readily Accessible Over Peer to Peer Networks*, Testimony before the H. Comm. on Gov't Reform, United States General Accounting Office, GAO-03-537T (statement of Linda D. Koontz, Director, Information Management Issues), 15-20 (March 13, 2003).

[34] There are two main types of hash values, SHA-1 and MD5. SHA-1 was created by the National Security Agency (NSA) and is published in the National Institute of Standards and Technologies as a Federal Information Processing Standard. MD5 was created by Ronald Rivest, a cryptographer and professor at the Massachusetts Institute of Technology.

peers) by matching the hash values of the original file with the completed file.

B. Bulletin Board System (BBS)

The use of the Bulletin Board System (BBS) predates the expansion of the Internet. As such, the use of this system drastically declined as the use of the World Wide Web increased. However, criminals intent on sharing and acquiring child abuse images have been steadily using this system because of its anonymity (one need only create a username and password), and because this old technology often flies under the radar of law enforcement investigations.[35] The computer code which designed the BBS was written to mimic a cork-board where information could be posted or taken off the board by a user.[36] Boards designed for special interests allow like-minded users to discuss topics (threads), upload files, download files, or in some cases create direct connections between users for private conversations (chats). This last capability provides a uniquely frightening

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[35] U.S. Dep't of Justice, *The National Strategy for Child Exploitation Prevention and Interdiction: A Report to Congress*, 11 (2010).

[36] Wired, This day in Tech, *Feb. 16, 1978: Bulletin Board Goes Electronic*, *available at* http://www.wired.com/thisdayintech/2010/02/0216cbbs-first-bbs-bulletin-board/ (last visited November 14, 2013).

opportunity for the online solicitation of children for sexually deviant purposes.[37]

C. File Transfer Protocol (FTP)

Another older but increasingly popular method of transferring files between users is File Transfer Protocol (FTP). There are several programs which allow for the transmission of files using this protocol, but each operates in relatively the same manner. Under FTP, computers "talk" to each other for the purpose of transferring files using a specified software program such as *Fetch* designed at Dartmouth for Macintosh users.[38] A user connects via the Internet to a server. However, instead of typing in "http://" (which stands for Hypertext Transfer Protocol) at the beginning of the Uniform Resource Locater (URL),[39] the user types in "ftp." This indicates access to an FTP server. There is also a requirement for the user to logon, but this may be done anonymously. The user connects to the server via a particular port (of which there are many). The user then begins what appears

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[37] U.S. Dep't of Justice, *The National Strategy for Child Exploitation Prevention and Interdiction: A Report to Congress*, 11 (2010).

[38] Dartmouth, Computing at Dartmouth, *available at* http://www.dartmouth.edu/comp/email-cal/other/collaboration-tools/ftp/ (last visited November 14, 2013).

[39] Indiana University, University Technology Information System, What is a URL?, *available at* http://kb.iu.edu/data/adnz.html (last visited November 14, 2013).

to be a dialogue with the server as a means of acquiring whatever file the user is looking for.

D. Chat Rooms

Chat Rooms became wildly popular in the mid-1990s when America Online (now AOL Inc.) introduced its People Connection.[40] There were virtually countless rooms based on topic and interest. A chat room is joined by downloading software to run the application, and then creating a username or nickname and a password. The user will choose a chat room based on his preference. Inside the chat room there will be other like-minded chatters and the conversation can consist of text-based chat (written word), voice chat (spoken word), graphic chat (using avatars or other images), and even video chat. These rooms can also allow for the upload and download of files. In addition, two or more people in a chat room can decide to engage in private conversations outside of the main chat room in order to discuss topics or transmit files. This technology is similar to instant messaging (IM), except IM is mostly geared toward person-to-person chat, while chat rooms are designed for groups of chatters.

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[40] AOL Inc., History & Overview, *available at* http://corp.aol.com/about-aol/overview (last visited November 14, 2013).

While chat room use has declined, aspects of chat rooms exist as part of many multiplayer online games such as: MineCraft™,[41] Halo®,[42] World of Warcraft®[43] and others.

E. The Deep Web and The Onion Router (TOR)

While the previously mentioned avenues in which criminals acquire and trade child abuse images are a constant source of concern for law enforcement and allied professionals, perhaps there is no greater impediment to detection by law enforcement than the use of the Deep Web[44] and ultimately The Onion

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[41] Minecraft is a trademark of Notch Development AB, and is a game where multiple players join to create and break blocks through different worlds as they combat enemies and go on adventures, *available at* https://minecraft.net/ (last visited November 14, 2013).

[42] Halo is owned by Microsoft Studios and is a first-person shooter game where players work with each other to help destroy enemies, *available at* http://www.halowaypoint.com/en-us (last visited November 14, 2013).

[43] World of Warcraft was developed by Blizzard Entertainment, and it allows users to play heroic characters who inhabit a world of magic, mystery, and adventure, *available at* http://us.battle.net/wow/en/game/guide/ (last visited November 14, 2013).

[44] The Deep Web is a group of websites which cannot be reached by regular search engines, and require the use of an anonymity software such as TOR. The Baltimore Sun, What is the 'Deep Web'? and other questions about the shadowy virtual world of Silk Road, *available at* http://articles.baltimoresun.com/2013-10-03/business/bal-silk-road-deep-web-explainer-20131003_1_satoshi-nakamoto-bitcoin-silk-road (last visited November 14, 2013).

Router (TOR).[45] The Deep Web has made news recently because of the arrest of Ross Ulbricht, a 26 year old who maintained the website known as the Silk Road.[46] The Silk Road is one of several major websites which essentially act as a pointer or meeting place for buyers and sellers of legal and illegal activity (child pornography, drugs, weapons, etc. . . .). While the original Silk Road website was taken down as part of the arrest of Ulbricht, it was right back up and operational within a month.[47] Aside from traditional money as a means in which to pay for services or goods, the use of digital money such as Bitcoin[48] is both increasing and difficult to track.

Each of the aforementioned methods for sharing and acquiring files has at least one thing in common,

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[45] The Onion Router (TOR) is an anonymity software and network which allows users to essentially hide their IP addresses by bouncing the user through a vast interconnected system of users (volunteers) for the purpose of concealing the identity and location of the user. The TOR Project, *available at* https://www.torproject.org/ (last visited November 14, 2013).

[46] Discovery Communications LLC, What Is The Deep Web, *available at* http://news.discovery.com/tech/what-is-the-deep-web-130708.htm (last visited November 14, 2013).

[47] Laurie Segall, How Silk Road was Reborn, CNN Money November 6, 2013, *available at* http://money.cnn.com/2013/11/06/technology/new-silk-road/ (last visited November 14, 2013).

[48] "Bitcoin uses peer to peer technology to operate with no central authority or banks; managing transactions and the issuing of bitcoins is carried out collectively by the network. Bitcoin is open-source; its design is public, nobody owns or controls Bitcoin and everyone can take part." Bitcoin Project, *available at* http://bitcoin.org/en/ (last visited November 14, 2013).

that is, the user specifically asks for the particular file being acquired. The use of modern technology by criminals makes up an interconnected and deeply committed marketplace for the shared purpose of acquiring and offering child abuse images.

III. VICTIMS OF THESE CRIMES ARE ENTITLED TO RESTITUTION FOR THE FULL AMOUNT OF THEIR LOSSES, IRRESPECTIVE OF WHETHER THOSE LOSSES PROXIMATELY RESULTED FROM A PARTICULAR DEFENDANT'S CRIME.

Some causation is certainly a condition precedent to an order of restitution under 18 U.S.C. §2259; however the degree of causation required is dependent upon which specific provision under the statute restitution is being sought. Petitioner Paroline would have this Court read a proximate causation requirement for each provision of the statute and not "parse commas versus semicolons or debate grammar."[49] But statutes are built of words and sentences, so statutory interpretation necessarily requires attention to grammar and punctuation. One cannot simply ignore them when they are inconvenient, as Petitioner urges this Court to do.

A. The Plain Meaning Rule

The starting point (and in this case, also the ending point in the statutory construction) is the

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[49] Pet. Br. 26.

language of the statute itself. Each of the enumerated subsections of the definition paragraph can be read as a complete and independent sentence. That is to say, when defining "the full amount of the victim's losses," subsections (A) through (E) specifically enumerate types of compensable losses. They require no additional information to be either clear or actionable. These types of compensable losses are definite and tangible, and can be proven via fee schedules and bills. On the other hand, subsection (F) is an amorphous area for compensable loss. As such, it contains language necessary for its understanding vis-a-vis the "proximate result" language. Without this, the catch-all provision could be read to interpret compensable losses wholly unrelated to the offense at hand. This would be an absurd result. "Where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."[50] As this Court held in *Hooper v. California*, "The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality."[51] "This approach not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like

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[50] *DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988) citing *National Labor Relations Board v. The Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979) "[A]n Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available.

[51] *Hooper v. California*, 155 U.S. 648, 657 (1895).

this Court, is bound by and swears an oath to uphold the Constitution."[52] More, reading the proximate result language into the specifically enumerated subsections as opposed to only the catch-all subsection is contrary to the plain language of the statute itself. The statute includes the language "notwithstanding §3663 or §3663A . . . " in directing courts to order restitution. Section 3663A defines "victim" as "a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered."[53] This definition is directly at odds with the definition of victim in §2259 which specifically does not use the language "directly and proximately harmed." "In interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."[54] When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete."[55]

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[52] *DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988).

[53] 18 U.S.C. 3663A(a)(2).

[54] *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992), citing *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241-242 (1989); *United States v. Goldenberg*, 168 U.S. 95, 102-103 (1897); *Oneale v. Thornton*, 6 Cranch 53, 68, 3 L.Ed. 150 (1810).

[55] *Rubin v. United States*, 449 U.S. 424, 430, 101 S.Ct. 698, 701, 66 L.Ed.2d 633 (1981); *see also, Ron Pair Enterprises*, supra, 489 U.S. at 241, 109 S.Ct. at 1030.

B. Grammar and Punctuation Clarify Meaning

The plain meaning of the statute is reinforced by the chosen punctuation. Subsections (3)(A)-(F) are each unique categories of compensable loss. Each subsection contemplates multiple types of compensable loss within the particular category. For instance subsection (A) allows for compensable losses related to medical services. Through the proper use of punctuation, the contemplated medical losses are further annotated into physical, psychiatric, or psychological. A different reading makes the chosen groupings by Congress seem indiscriminate, as opposed to carefully thought out and separated by semicolons. There would then be no logical reason for creating six subsections of losses instead of thirteen. Rather, a plain reading of the statute shows that, if a victim has another type of loss which does not directly fall into one of these enumerated and contemplated categories, her hope for restitution is not doomed. She can make a claim under subsection (F), the catch-all provision. However in this case, she would have the additional burden to prove this uncontemplated loss was a proximate result of the offense.

Petitioner's argument that upholding the *en banc* Fifth Circuit's decision would render restitution in criminal sentencing a "strict liability proposition"[56] illustrates a flawed reading of the plain language of

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[56] Pet. Br. 17.

the statute. The conditions precedent to being considered a "victim" require that one be "harmed as a result of a commission of a crime under this chapter."[57] First, not any child exploited in photographs can seek restitution from any defendant. Rather the exploited child must be among the sexual abuse images possessed, transferred, received, etc. by that particular defendant. Second, that child must illustrate harm. This is hardly a strict liability offense.

Although this is not a strict liability statute, this Court is familiar with strict liability legislation, and has upheld criminal convictions resulting therefrom. Perhaps one of the most important cases to be decided on this issue relating to statutory interpretation is *United States v. Dotterweich*.[58] Dotterweich, the president of Buffalo Pharmacal Company was criminally convicted of three counts of violating the Federal Food, Drug, and Cosmetic Act of 1938,[59] which makes it a misdemeanor to introduce or deliver for introduction into interstate commerce any drug that is adulterated or misbranded. This legislation makes Dotterweich and other similarly situated executives vicariously liable for the crimes of others, even if they were not directly involved in the criminal activity. The Circuit Court of Appeals reversed Dotterweich's conviction maintaining that the corporation was the

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[57] 18 U.S.C. §2259(c).

[58] *United States v. Dotterweich*, 320 U.S. 277 (1943).

[59] 21 U.S.C. §§301-392 (1938).

only "person" subject to prosecution unless Buffalo Pharmacal Company was a counterfeit corporation serving as a screen for Dotterweich. This Court however, reversed the Court of Appeals' decision by addressing the lower court's faulty interpretation of the statute as the basis for its decision. This Court noted "... regards for the purposes of the legislation"[60] (protection of the lives and health of the people) "should infuse construction of the legislation if it is to be treated as a working instrument of government and not merely as a collection of English words."[61] As *Dotterweich* is an illustration of strict liability legislation, the case at bar is a far cry from strict liability.

The use of semicolons and commas were of primary importance in *United States v. Rigas*.[62] The Rigases were convicted in the Southern District of New York for conspiracy to defraud the United States, in violation of 18 U.S.C. §371.[63] They were subsequently indicted in the Middle District of Pennsylvania for the same crime but with respect to the tax

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[60] *Dotterweich*, 320 U.S. at 280.

[61] *Id. See also, United States v. Park*, 421 U.S. 658 (1975), upholding *Dotterweich*.

[62] *United States v. Rigas*, 605 F.3d 194 (3d Cir. 2010).

[63] The Rigases were father (CEO) and son (CFO) of Adelphia, a cable television provider. Adelphia collapsed amid over leveraging of shares and assumption of debt by the Rigases. Their indictment in New York claimed the Rigases attempted to hide the financial ruin of Adelphia from the Securities and Exchange Commission (SEC) and the public.

evasion portion of their criminal acts.[64] The Rigases claimed the subsequent prosecution in Pennsylvania subjected them to double jeopardy,[65] and moved for dismissal of the indictment.[66] Their argument was "18 U.S.C. §371 creates a single statutory offense of conspiracy that can be violated in alternative ways," therefore they could "only be tried once for a single conspiratorial agreement in violation of that statute."[67] The text of 18 U.S.C. §371 reads

> [i]f two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

The district court denied the motion, and the Rigases appealed.[68] On appeal the Rigases argued the proper test to consider the overall issue was the totality of the circumstances,[69] while the Government argued to use the *Blockburger* test.[70] The lower court believed

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[64] *Rigas*, 605 F.3d at 200-203.

[65] U.S. CONST. amend. V.

[66] *Rigas*, 605 F.3d at 203.

[67] *Id.*

[68] *Id.*

[69] *United States v. Liotard*, 817 F.2d 1074, 1077 (3d Cir. 1987).

[70] *Blockburger v. United States*, 284 U.S. 299, 304 (1932). "Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine

(Continued on following page)

that utilizing either test before determining whether §371 creates a single offense "puts the cart before the horse."[71] Therefore, in determining whether Congress intended to create a single offense or multiple offenses, a plain reading of the text was paramount.[72] "When Congress crafts a statute to create distinct offenses, it typically utilizes multiple subsections or separates clauses with semicolons to enumerate the separate crimes."[73] Finding only a single offense, the court held "[h]ere, unlike most statutes that create multiple offenses, §371 is a single sentence, divided only by commas. The fact that Congress declined to structure §371 in such a manner undermines the interpretation advanced by the Government and supports our single-offense rendering of the statute."[74] In similar fashion, the text of §2259, in using multiple subsections with semicolons, supports the idea that Congress intended to make separate and distinct categories of compensable loss.

In addition, this Court need not find itself constrained to punctuation only. In fact, this Court has departed from such punctuation analysis in the past, when to allow primary importance on this analysis

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whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."

[71] *Rigas*, 605 F.3d at 205.

[72] *Id.* at 207.

[73] *Id.* at 209.

[74] *Id.* *see, e.g.*, *Jones v. United States*, 526 U.S. 227, 252 (1999) (interpreting 18 U.S.C. §219, the federal carjacking statute, as creating three distinct crimes).

would be "incomplete and runs the risk of distorting a statute's true meaning."[75] In *National Bank v. Independent Insurance Agents*, this Court ultimately held the punctuation (placement of quotation marks) to be a result of a "scriveners error" when it considered also the whole provision of the statute, its object, and policy.[76] *National Bank v. Independent Insurance Agents* was an "unusual case," and "[a]gainst the overwhelming evidence from the structure, language, and subject matter of the 1916 Act there stands only the evidence from the Act's punctuation, too weak to trump the rest."[77] On the other hand, this Court has held that a plain reading of a statute when supported by the grammatical structure illustrate Congress' intent on a matter.[78] Such is the instant case, where Congress intended to provide greater protection to this special population when it chose not to include the proximate result language in either its definition of "victim" or in any other enumerated provision save the catch-all. The use of commas and semicolons support this plain reading.

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[75] *United States Nat'l Bank of Oregon v. Independent Ins. Agents*, 508 U.S. 439, 454 (1993).

[76] *Id.* at 455 (quoting *United States v. Heirs of Boisdore*, 49 U.S. 113, 122 (1849)).

[77] *United States Nat'l Bank of Oregon*, 508 U.S. at 462.

[78] *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241-242 (1989).

C. When Congress Chooses to Include a General Proximate Cause Requirement, it Knows How to do so.

As part of the Violence Against Women Act of 1994, Congress demonstrated its keen ability to legislate according to its intent. For example, in §2248 Mandatory Restitution for Sex Crimes, subsection (b)(3)(E) the definition of "full amount of the victim's losses" includes the language "plus any costs incurred in obtaining a civil protection order" in the same category as contemplated attorneys' fees.[79] Immediately following this in §2259 Mandatory Restitution for Sexual Exploitation and Other Abuse of Children, subsection (b)(3)(E) noticeably does not contain the civil protection order costs language. Rather, broader language "as well as other costs incurred" is used.[80] Presumably, Congress intended to use this broader language according to its understanding that one category of victims might have different needs than another. In any case, this is a clear demonstration that "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[81]

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[79] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §40113, 108 Stat. 1904.

[80] *Id.* at 108 Stat. 1907.

[81] *Bates v. United States*, 522 U.S. 23, 29-30 (1997) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

In contrast, 18 U.S.C. §2327, part of the same Public Law, but concerning Telemarketing Fraud, creates a general proximate cause requirement for compensable losses.[82] Section 2327(b)(3) does not have a list of enumerated categories like §2248 and §2259; rather, it simply defines "full amount of the victim's losses" as "all losses suffered by the victim as a proximate result of the offense."[83]

The differences between §2327 and both §2248 and §2259 illustrate an important distinction – that is, when Congress chooses to include a general proximate cause requirement, it knows how to do so. Had Congress intended to treat mandatory restitution uniformly regardless of the type of crime, it simply needed to use the singular paragraph of general proximate cause it used in the Telemarketing Fraud section. The fact that it chose not to use uniform language, demonstrates both that the plain reading of §2259 does not include a general proximate cause requirement, and Congress did not intend to create a general proximate cause requirement.[84]

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[82] Violent Crime Control and Law Enforcement Act, §250002, 108 Stat. 2083.

[83] *Id.*

[84] *See Meghrig v. KFC Western Inc.*, 516 U.S. 479 (1996). The Court examined two analogous statutes, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Resource Conservation and Recovery Act (RCRA) when considering a citizen suit regarding the ability to recover cleanup costs from contributing parties in certain circumstances. Holding that "Congress . . . demonstrated in CERCLA

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IV. JOINT AND SEVERAL LIABILITY IS THE APPROPRIATE MECHANISM FOR PETITIONER TO REAPPORTION RESTITUTION.

Petitioner pled guilty to a violation of 18 U.S.C. §2252 for possession of 150-300 images of minors engaged in sexually explicit conduct.[85] This statute requires as a condition precedent to guilt, that the actor "knowingly" possess these abusive images.[86] There can be no dispute therefore that Petitioner *knowingly* possessed sexual abuse images of Amy. In fact, the Dallas Morning News reported that Petitioner "says Internet child porn eased stress from his new business . . . and he admits to being aroused and sometimes masturbating."[87] As previously described, the technology available for acquiring sexual abuse images of Amy, and others like her, require the user to purposefully seek them out. Consistent with Petitioner's guilty plea, it requires no inference that he *purposefully* sought out the abuse images he possessed. As also previously argued, Petitioner, and others like

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that it knew how to provide for the recovery of cleanup costs, and that language used to define the remedies under RCRA does not provide that remedy."

[85] *In re Amy Unknown*, 701 F.3d 749, 752 (5th Cir. 2012) *en banc*.

[86] 18 U.S.C. §2252(a)(4)(B).

[87] Lee Hancock, The Dallas Morning News, *In just a few clicks of child porn, several lives are ruined*, November 28, 2010, *available at* http://www.dallasnews.com/news/state/headlines/20101128-In-just-a-few-clicks-of-5077.ece?nclick_check=1 (last visited November 14, 2013).

him, create the demand for these abusive images, which in turn fuel the supply, thus ultimately creating a marketplace. If Petitioner intentionally possessed images capturing the rape and sexual abuse of Amy, than aside from being a criminal act, his actions are also consistent with an intentional tort.

Petitioner argues that the "*en banc* Fifth Circuit's holdings create an absurd result . . . and that joint and several liability would create a judicial nightmare."[88] This argument however seems to track that of negligent tortfeasers, rather than that of intentional tortfeasors such as Petitioner.

The harm to Amy, and others like her, is that the rapes and sexual abuse she endured as a child live in perpetuity, and for the sexual gratification of others. As this Court understood in *Ferber*, "[a] child who has posed for a camera must go through life knowing the recording is circulating within the mass distribution system for child pornography."[89] When Petitioner purposefully sought out and possessed the sexually abusive images of Amy, his actions either intentionally or

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[88] Pet. Br. 54.

[89] *New York v. Ferber*, 458 U.S. 747, 760 (1982) (citing David P. Shouvlin, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 Wake Forest L. Rev. 535, 545 (1981)). *See also Violent Crime Control and Law Enforcement Act* of 1994, Pub. L. No. 104-208, §121, 110 Stat. 3009-26. Findings by Congress that "child pornography permanently records the victim's abuse, and its continued existence causes the child victims . . . continuing *harm* by haunting those children in future years."

recklessly created the very harm for which Amy seeks restitution. It does not matter that others create the same harm. Undoubtedly there are and will be countless people who purposefully seek out and possess these images of Amy's repeated sexual assault. The harm inflicted on Amy by Petitioner is 100% Petitioner's fault; so is it also 100% the fault of any other person who knowingly possesses these images. In other words, Petitioner's conduct creates an indivisible harm for which he is entirely responsible. The burden to reapportion costs related to restitution should be upon Petitioner and others like him. It should not be on Amy and others like her. If the purpose of restitution is to make Amy whole, to the extent money can do so, then putting the burden on her to describe with particularity the specific harm each defendant's actions contribute creates the opposite effect. Instead, Amy arguably suffers greater harm with this approach, not to mention the impossibility of dividing indivisible harm. On the other hand, in the instant case Amy has presented a quantifiable amount of loss based upon the harm caused by Petitioner and others like him. This loss includes future medical and psychological counseling as well as lost wages. Petitioner is responsible for the full amount of Amy's losses, and the fact that someone else is or will be is Petitioner's burden, not Amy's.

Consider also, albeit in the criminal context, the notion of vicarious liability. A group of like-minded individuals agree to rob a bank. Two perpetrators enter the bank with loaded firearms. During the

robbery, Perpetrator 1 uses his firearm and kills a bank teller. The two flee the bank and enter the "get-away car." The car is driven by a third perpetrator, who never enters the bank and never possesses a firearm. Through good police work, the three perpetrators are captured. Each of the three men are responsible for the actions of the others. The get-away car driver is as responsible for the bank robbery and the death of the bank teller as Perpetrator 1 (who pulled the trigger.) So too, is Perpetrator 2 (who never used his firearm). In other words, it is irrelevant to the criminal prosecution of Perpetrator 2 or the get-away driver, that Perpetrator 1 gets convicted and receives a life sentence for the robbery of the bank and the death of the bank teller.

The marketplace for production, distribution, receipt, and possession of child abuse images relies on an interconnected and interdependent parasitic relationship. Those who consume child abuse images need, expect, and want children to be sexually abused and violated in order to create said images. Those who create the images (and this is especially true in Amy's case) do so for, among other reasons, the people who want the images. In some cases the consumers and the producers will never meet or even know of each other. However, the very nature of the child pornography marketplace is clandestine and reliant upon these like-minded perpetrators. No argument is being advanced that Petitioner is criminally vicariously liable for the sexual abuse of Amy or the hundreds of other child abuse images he possessed. However,

Petitioner did enter a de facto conspiratorial enterprise with those who created and distributed these images. He is ultimately then, as much responsible for the single harm Amy suffers as any other member of the enterprise.

Aside from the internal structure outlined in §2259, Congress has provided a mechanism via 18 U.S.C. §3664(h) to aid courts in finding a balance that both allows victims to recover the full amount of their losses, "and ensures that no defendant bears more responsibility than is required for full restitution."[90] This provision also ensures that Amy cannot recover sums of money untold; rather, she is capped at the calculated full amount of her losses.[91] Therefore any argument that Amy can recover a greater sum of money than the full amount of her losses is unfounded.

CONCLUSION

Injury to victims like Amy, require a great deal of continued care and associated expenses. The criminal actions of Petitioner are responsible for the very injury suffered by Amy, and others like her. Congress recognized this link and sought to hold offenders accountable for this injury via 18 U.S.C. §2259. This statute was written to reflect this broad

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[90] *In re Amy Unknown*, 701 F.3d 749, 769 (5th Cir. 2012) *en banc*.

[91] *Id.* at 770 (internal citations omitted).

restitutionary purpose, and there was no general proximate cause requirement written into the statute. The *en banc* Fifth Circuit correctly recognized this, and properly held Petitioner accountable for the full amount of Amy's losses. For the aforementioned reasons, this Court should affirm the lower court's holding.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 12-8561

In the Supreme Court of the United States

DOYLE RANDALL PAROLINE,

Petitioner,

v.

UNITED STATES and AMY UNKNOWN,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF "VICKY" AND "ANDY" AS AMICI CURIAE IN SUPPORT OF RESPONDENT AMY UNKNOWN

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QUESTION PRESENTED

What, if any, causal relationship or nexus between the defendant's conduct and the victim's harm or damages must the government or the victim establish in order to recover restitution under 18 U.S.C. § 2259?

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INTEREST OF AMICI CURIAE

"Vicky" and "Andy" are victims of child pornography. Like respondent Amy Unknown, they are seeking restitution from defendants convicted of possessing videos and photographs depicting them being raped and sodomized as young children.[1]

1. Vicky's father began raping her, with his video camera running, when she was ten years old. He circulated these video clips widely among fellow pedophiles. Often he took "orders" for scripted videos of rape, sodomy, and bondage. He intimidated Vicky into not telling anyone. It was not until Vicky was sixteen that she was finally able to tell her mother. By then, the videos of Vicky's father raping her were famous among consumers of child pornography. They still are.

Vicky was seventeen when she learned that the videos are widely available on the Internet. She is now in her mid-twenties. She still suffers serious psychological trauma. She has nightmares about the abuse. She often has panic attacks and is unable to sleep. She still requires regular counseling. Sometimes she is stalked by collectors of the videos her father made. Despite repeated efforts, thus far she has been unable to work in any job that involves contact with strangers.

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[1] The parties have filed blanket consents to the filing of amicus briefs. No counsel for any party authored this brief in whole or in part, and no person or entity other than amici and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. "Vicky" and "Andy" are not amici's real names.

As Vicky has explained,

> I am living every day with the horrible knowledge that someone somewhere is watching the most terrifying moments of my life and taking grotesque pleasure in them. I am a victim of the worst kind of exploitation: child porn. Unlike other forms of exploitation, this one is never ending. Everyday people are trading and sharing videos of me as a little girl being raped in the most sadistic ways. They don't know me, but they have seen every part of me. They are being entertained by my shame and pain.

I had no idea the "Vicky" series, the child porn series taken of me, had been circulated at all, until I was 17. My world came crashing down that day. These past years have only shown me the enormity of the circulation of these images and added to my grief and pain. This knowledge has given me a paranoia. I wonder if the people I know have seen these images. I wonder if the men I pass in the grocery store have seen them. Because the most intimate parts of me are being viewed by thousands of strangers and traded around, I feel out of control. They are trading my trauma around like treats at a party, but it is far from innocent. It feels like I am being raped by each and every one of them. What are they doing when they watch these videos anyway? They are gaining sexual gratification from me at ages 10 and 11. It sickens me to the core and terrifies me. Just thinking about it now, I

> feel myself stiffen and I want to cry. So many nights I have cried myself to sleep thinking of a stranger somewhere staring at their computer with images of a naked me on the screen. I have nightmares about it.
>
> My paranoia is not without just cause. Some of these perverts have tried to contact me. Every time they are downloaded, I am exploited again, my privacy is breached, and my life feels less and less safe. I will never be able to have control over who sees me raped as a child. It's all out there for the world to see and it can never be removed from the internet.

2. Andy was sexually abused for three years, beginning when he was eight or nine years old. His abuser was a man named Antonio Cardenas, who gained access to Andy while a volunteer at Big Brothers Big Sisters of Utah, an organization that pairs children with adult mentors. Cardenas made many videos of himself abusing Andy, which he traded with other collectors of child pornography. These videos have now circulated widely on the Internet, where they are well known as the "SpongeBob" series, because the first of the videos features Andy on a blanket bearing the image of the SpongeBob cartoon character.

Andy is now a teenager in high school. Cardenas was convicted in 2012, but his videos of Andy are still easily found on the Internet. Andy has already received more than five hundred notifications of defendants being prosecuted in federal court for pos-

sessing "SpongeBob" videos, and that number increases all the time. Andy suffers from many of the known effects of child sexual victimization, including problems with anger and fighting triggered by comments about homosexuality.

SUMMARY OF ARGUMENT

I. Petitioner contends that unless the Court accepts his interpretation of 18 U.S.C. § 2259, restitution awards under the statute might violate the Eighth Amendment. But this contention is incorrect. The Eighth Amendment prohibits "excessive fines" and "cruel and unusual punishments," but restitution under the statute is neither a fine nor a punishment. It is a civil remedy intended to compensate the victim. The Court can thus interpret the text of the statute straightforwardly, without having to worry about avoiding constitutional difficulties.

Restitution under § 2259 is not a fine, because the award is payable to the victim rather than to the government. The Excessive Fines Clause applies only to payments to the government.

Restitution under § 2259 is not a punishment, because its purpose is not to punish the defendant but rather to make the victim whole by compensating her for her losses. While restitution may also serve indirectly to deter wrongdoing, the same is true of all compensatory damage awards.

If a victim of child pornography recovered compensatory damages in stand-alone proceedings, the

judgment would clearly be a civil damage award, not a fine or a punishment. The only circumstance that even gives rise to a colorable argument that a restitution award under § 2259 is a form of punishment is that it is awarded at the end of a criminal prosecution. But restitution awards have been tacked on to criminal prosecutions for centuries, in England and in the United States. They have never been understood as punishments.

II. Petitioner also contends that if § 2259 is ambiguous, the rule of lenity should apply. But this contention is also incorrect, for the same reason. The rule of lenity applies to *criminal* statutes, but § 2259 is not a criminal statute, because it prescribes neither a crime nor a punishment. Section 2259 is a remedial statute, so if it is ambiguous, the appropriate canon of construction is the one that states that remedial statutes should be liberally construed.

ARGUMENT

Petitioner contends that unless the Court accepts his interpretation of 18 U.S.C. § 2259, restitution awards under the statute might violate the Eighth Amendment. Pet. Br. at 58-66. But this contention is incorrect. Restitution under the statute is not subject to the Eighth Amendment, because it is neither a fine nor a punishment, but is rather a civil remedy intended to compensate the victim. The Court can thus interpret the text of the statute straightforwardly, without having to worry about avoiding constitutional difficulties.

Petitioner also contends that if § 2259 is ambiguous, the rule of lenity should apply. Pet. Br. at 39-43. But this contention is also incorrect, for the same reason. The rule of lenity applies to *criminal* statutes, but § 2259 is not a criminal statute, because it prescribes neither a crime nor a punishment. Section 2259 is a remedial statute, so if it is ambiguous, the appropriate canon of construction is the one that states that remedial statutes should be liberally construed.

I. Restitution under 18 U.S.C. § 2259 is not subject to the Eighth Amendment, because the restitution award required by § 2259 is neither a fine nor a punishment, but is rather a civil remedy intended to compensate the victim.

The Eighth Amendment prohibits "excessive fines" and "cruel and unusual punishments." It does not apply to the restitution required by 18 U.S.C. § 2259, which is neither a fine nor a punishment. Restitution under § 2259 is not a fine because the award goes to the victim, not to the government. It is not a punishment, because it is a civil remedy intended to compensate the victim rather than to punish the defendant. While restitution is awarded at the conclusion of a criminal prosecution, that does not transform restitution into either a fine or a punishment.

A. Restitution under § 2259 is not a fine, because the award is payable to the victim, not to the government.

A restitution order under § 2259 must "direct the defendant to pay the victim." 18 U.S.C. § 2259(b)(1). No money goes to the government. Restitution is thus sharply distinguishable from fines and from forfeitures, which both require defendants to pay money to the government rather than to the victim.

Because the restitution award is payable to the victim rather than to the government, the Excessive Fines Clause does not apply. "The Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government." *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 268 (1989). In *Browning-Ferris*, the Court thoroughly reviewed the eighteenth-century sources and concluded that "at the time of the drafting and ratification of the [Eighth] Amendment, the word 'fine' was understood to mean a payment to a

sovereign." *Id.* at 265. The Excessive Fines Clause thus limits *in personam* forfeitures as well as fines, because such forfeitures, like fines, are payable to the government. *United States v. Bajakajian*, 524 U.S. 321, 328-32 (1998); *Austin v. United States*, 509 U.S. 602, 607-10 (1993). But restitution is very different, because restitution, like any other civil judgment, is payable to the victim.

A harder case would be presented by a statute that authorized the government to seek an award of restitution to itself, to compensate the government for its own damages. In such a case, restitution would be "a payment to a sovereign," *Browning-Ferris*, 492 U.S. at 265, just like a fine or a forfeiture. There might be good reason to treat restitution to the government differently from restitution to a private victim. *Cf. Pasquantino v. United States*, 544 U.S. 349, 365 (2005) (in dictum, describing restitution to a sovereign as a form of criminal punishment). But that question is not presented here, because § 2259 authorizes restitution only to "the individual harmed as a result of a crime under this chapter," not to the government. 18 U.S.C. § 2259(c).

B. Restitution under § 2259 is not punishment, because it is a civil remedy intended to compensate the victim rather than to punish the offender.

Restitution under § 2259 is compensatory, not punitive. It is measured by what the victim has lost. 18 U.S.C. § 2259 (b)(1). As Judge Posner has observed of a similar statute, § 2259 is "[f]unctionally .

. . a tort statute," one that "enables the tort victim to recover his damages in a summary proceeding ancillary to a criminal prosecution." *United States v. Bach*, 172 F.3d 520, 523 (7th Cir. 1999) (discussing 18 U.S.C. § 3663, which likewise authorizes restitution in the amount of the victim's losses), cert. denied, 528 U.S. 950 (1999). *See also United States v. Carruth*, 418 F.3d 900, 904 (8th Cir. 2005) ("it is essentially a civil remedy created by Congress and incorporated into criminal proceedings for reasons of economy and practicality"). Professor Laycock, the leading American authority on restitution, characterizes it the same way. As the term *restitution* is used "in the statutes requiring criminals to make restitution to their victims," he concludes, restitution "is simply compensatory damages." Douglas Laycock, "The Scope and Significance of Restitution," 67 *Tex. L. Rev.* 1277, 1282 (1989).

The purpose of restitution is to make the victim whole by compensating her for her losses. *Hughey v. United States*, 495 U.S. 411, 416 (1990) ("restitution as authorized by the statute is intended to compensate victims"); *Dolan v. United States*, 130 S. Ct. 2533, 2539-40 (2010). For this reason, the level of compensation under § 2259 does not vary with the culpability of the defendant. If guiltier defendants had to pay more, then the payment might properly be termed a criminal penalty. But an award authorized by § 2259, like any award of compensatory tort damages, is intended to be compensation, not punishment.

This distinction between compensation and punishment underlies *Kelly v. Robinson*, 479 U.S. 36 (1986), in which the Court had to decide whether a restitution award was nondischargeable in bankruptcy as a criminal penalty. The particular Connecticut restitution program at issue in *Kelly* was very different from § 2259, because Connecticut's version of restitution did "not turn on the victim's injury, but on the penal goals of the State and the situation of the defendant." *Id.* at 52. For that reason, the Court classified Connecticut's restitution program as penal in nature, on the ground that the state's restitution orders "operate for the benefit of the State" and "are not assessed for compensation of the victim." *Id.* at 53 (internal quotation marks and ellipsis omitted).

Restitution under § 2259 is precisely the opposite: it *is* assessed to compensate the victim, and it operates for the benefit of the victim rather than the state. It is a summary tort remedy, tacked on to the end of a criminal prosecution. Unlike the Connecticut program in *Kelly*, it is a civil remedy rather than a criminal punishment.

To be sure, while restitution under § 2259 is primarily intended to compensate victims, it may also serve indirectly to deter wrongdoing, if potential possessors of child pornography are aware that they will have to compensate their victims. But that does not convert restitution into a criminal penalty. Virtually all law serves some deterrent purpose. Compensatory damage awards may deter wrongdoing like criminal penalties do, but that does not mean compensatory damage awards are criminal punish-

ments; it merely indicates that "deterrence may serve civil as well as criminal goals." *Hudson v. United States*, 522 U.S. 93, 105 (1997) (internal quotation marks omitted); *United States v. Ursery*, 518 U.S. 267, 292 (1996). To call restitution under § 2259 a punishment, on the ground that it serves in part as a deterrent, would be to collapse the entire civil/criminal distinction.[2]

C. Restitution under § 2259 is awarded at the end of a criminal prosecution, but that does not make it a criminal punishment.

If a victim of child pornography recovered compensatory restitution damages in stand-alone proceedings, the judgment would clearly be a civil damage award, not a criminal punishment. The only circumstance that even gives rise to a colorable argument that a restitution award under § 2259 is a fine or a punishment is that it is awarded at the end of a criminal prosecution. But that does not turn restitution into criminal punishment.

Restitution awards to compensate the victims of crime have been tacked on to criminal prosecutions for centuries. They were common in England before

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[2] In urging the Court to find that restitution is punishment, petitioner relies primarily on *United States v. Halper*, 490 U.S. 435 (1989), and *Department of Revenue v. Kurth Ranch*, 511 U.S. 767 (1994). Pet. Br. at 61-62. But these cases were overruled by *Hudson*, to the extent they held that a deterrent purpose is enough to convert a civil judgment into a criminal punishment. *Hudson*, 522 U.S. at 101-03.

the American Revolution. William Blackstone, 4 *Commentaries on the Laws of England* 356 (1769) ("if any person be convicted of larciny [sic] by the evidence of the party robbed, he shall have full restitution of his money, goods, and chattels; or the value of them out of the offender's goods"); Matthew Hale, 1 *The History of the Pleas of the Crown* 538 (1736) ("Upon an appeal of robbery or larciny [sic], if the party were convict thereupon, restitution of the goods contained in the appeal was to be made to the appellant").

Restitution awards were also widely used in the early United States, as adjuncts to criminal prosecutions, for the purpose of compensating crime victims. *See, e.g.*, Francis Wharton, *A Treatise on the Criminal Law of the United States* 352, 368 (1846) (describing the use of restitution in Pennsylvania); J.A.G. Davis, *A Treatise on Criminal Law* 458, 474 (1838) (same for Virginia); Thomas G. Waterman, *The Justice's Manual* 130 (1825) (New York); Daniel Davis, *A Practical Treatise Upon the Authority and Duty of Justices of the Peace* 48 (1824) (Massachusetts); Harry Toulmin and James Blair, *A Review of the Criminal Law of the Commonwealth of Kentucky* 303 (1804) (Kentucky).

These summary restitution proceedings served, and indeed still serve, two purposes. First, they spare crime victims from having to waste time and money bringing a parallel and duplicative civil suit for damages. When the defendant's guilt has already been proven beyond a reasonable doubt, there is no reason to require the victim to prove it all over again in a second proceeding. Second, they spare crime vic-

tims from having to relive the crime unnecessarily, in the form of testimony and pretrial discovery. This is particularly important with a crime like child pornography, where having to tell one's story over and over again can be an excruciating experience for the victim.

There is thus a long Anglo-American tradition of restitution at the end of a criminal prosecution. But there is no evidence that such restitution was ever understood as a criminal punishment in its own right. Rather, as one of the leading nineteenth-century treatises put it, restitution is "a matter of civil jurisprudence, arising in a criminal case." Joel Prentiss Bishop, 2 *Commentaries on the Criminal Law* 275 (1858).

Perhaps the surest sign that restitution was not understood as a criminal punishment is that, to our knowledge, no one before the late twentieth century even thought to challenge a restitution award under the Eighth Amendment or its state constitutional analogues. Indeed, if restitution had been understood as a criminal punishment, there should also have been challenges to awards on the ground that they were decreed by judges rather than juries, and yet there do not appear to have been any such challenges until recently.

In light of this long history, the seven factors enumerated in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), all point in the direction of finding that restitution under § 2259 is not a punishment. First, restitution does not "involve[] an affirmative disability or restraint," *id.* at 168, but

merely an obligation to compensate the victim for her losses. Second, restitution has not "historically been regarded as a punishment," *id.*, but rather as compensation. Third, while restitution does "come[] into play only on a finding of *scienter*," *id.*, that is because scienter is an element of the crime of possessing child pornography, which is punished separately by a term in prison. Restitution is not itself the punishment. Fourth, restitution does not promote the aim of "retribution," and only indirectly promotes "deterrence," *id.*; its primary purpose is compensating the victim. Fifth, restitution only applies to behavior that "is already a crime," *id.* Sixth, there is "an alternative purpose to which it may be rationally connected" that "is assignable for it," *id.* at 168-69, namely that of compensation. Finally, the amount of restitution is not "excessive in relation to" the purpose of compensation, *id.* at 169; indeed it is precisely tailored to that purpose.

Because restitution under § 2259 is a civil remedy intended to compensate the victim, not a fine or a punishment, it is not subject to the Eighth Amendment. The Court can therefore interpret the text of the statute straightforwardly, without having to worry about avoiding constitutional difficulties.[3]

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[3] If restitution under § 2259 were subject to the Eighth Amendment, we would agree with the United States that no award under the statute could be constitutionally excessive, because the statute limits the award to the amount of the victim's losses. U.S. Br. at 47 n.18.

II. Because 18 U.S.C. § 2259 is not a criminal statute, the rule of lenity does not apply to it.

Petitioner suggests that if § 2259 is ambiguous, the rule of lenity should apply. Pet. Br. at 39-43. But the rule of lenity is an aid only in the interpretation of "*criminal* statutes." *United States v. Rodgers*, 466 U.S. 475, 484 (1984) (emphasis added). The rule is, and always has been, that "*penal* laws are to be construed strictly." *United States v. Wiltberger*, 18 U.S. 76, 95 (1820) (emphasis added). There is no rule of lenity for statutes that merely authorize compensatory damage awards.

As explained above, § 2259 is not a criminal statute. It does not set forth a crime or impose a punishment. Rather, it establishes a civil remedy to compensate the victims of child pornography. The rule of lenity thus does not apply.

The only conceivable argument for using the rule of lenity to interpret § 2259 rests on a single sentence in *Hughey v. United States*, 495 U.S. 411, 422 (1990), where the Court suggested that "longstanding principles of lenity" might aid in interpreting an ambiguous restitution statute. But this sentence is dictum. In *Hughey*, the Court had already found that the text of the statute was *not* ambiguous and that there was accordingly no need to invoke the rule of lenity. *Id.* at 415-20. The Court thus had no occasion in *Hughey* to consider whether restitution is a form of punishment, or whether the restitution statute at issue in the case was a criminal statute, or whether the rule of lenity applies to statutes authorizing

compensatory restitution awards. This sentence of dictum in *Hughey* cannot be understood to overturn the settled principle that the rule of lenity applies only to statutes setting forth crimes or imposing punishments.

Section 2259 is a remedial statute. It affords the remedy of compensatory damages to victims of child pornography. If the statute is ambiguous, therefore, the appropriate canon of construction is the one that states that remedial statutes should be liberally construed. *Peyton v. Rowe*, 391 U.S. 54, 65 (1968); *Stewart v. Kahn*, 78 U.S. 493, 504 (1870). Where a criminal statute is ambiguous, it makes sense to resolve the ambiguity in favor of the individual who is up against the full power of the government. But where a *remedial* statute is ambiguous, the case pits one individual against another individual. It makes sense to resolve the ambiguity in favor of the person the statute was intended to help. In interpreting § 2259, a tie should go to child pornography's victims, not its perpetrators.

CONCLUSION

The judgment of the Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

NOV 2 9 2013

No. 12-8561

In The Supreme Court Of The United States

DOYLE RANDALL PAROLINE,

PETITIONER,

v.

AMY UNKNOWN AND UNITED STATES,

RESPONDENT.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE STATES OF WASHINGTON, ALABAMA, ALASKA, COLORADO, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW MEXICO, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VERMONT, WEST VIRGINIA, WISCONSIN, AND WYOMING, AND THE TERRITORY OF UNITED STATES VIRGIN ISLANDS AS AMICI CURIAE IN SUPPORT OF RESPONDENT AMY UNKNOWN

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INTEREST OF AMICI CURIAE

The amici States have a strong interest in the outcome of this case. States have taken many steps to stamp out the sexual exploitation of children and the trafficking of children, but the expansion of the Internet has brought a surge in the marketing, trading, and possession of child pornography. This has led to victimization of more children and increased trafficking of children to meet the demand for new graphic depictions of sexual assault. The States have an interest in stamping out the sexual exploitation of children and in ensuring that their citizens receive full compensation for the recurring harm caused by ongoing marketing and possession of images of acts of sexual assault.

SUMMARY OF ARGUMENT

Child pornography is a rapidly growing problem for the States. The images and video portray sadistic acts of sexual violence against ever younger children. The use of the Internet to rapidly transmit this material nationwide requires not only a dedicated response by States, but also a robust federal framework to ensure full restitution to victims.

In enacting 18 U.S.C. § 2259, Congress directed the courts to order defendants to provide "full recovery" for the damages suffered by victims of child pornography. Allowing full recovery provides incentive to victims to undergo the pain of coming forward and identifying themselves as the individuals who suffered the sexual assault recorded in the images. This is a logical means of addressing the unique problem of providing restitution for each

victim who was harmed by the actions of defendants acting independently, in different locations across the country.

ARGUMENT

A. Child Pornography Is A Growing Problem That States Cannot Fully Address On Their Own

By the mid-1980s, law enforcement was successfully limiting the trafficking of hard-copy forms of child pornography. Richard Wortley & Stephen Smallbone, *Child Pornography on the Internet* (rev. 2012), www.cops.usdoj.gov/Publications/e04062000.pdf (last visited Nov. 1, 2013). But with the advent of the Internet, the creation and circulation of child pornography throughout the nation has exploded and has become a problem that states cannot possibly address on their own. Debra D. Burke, *The Criminalization Of Virtual Child Pornography: A Constitutional Question*, 34 Harv. J. on Legis. 439, 440 (Summer 1997). No longer are the images retained exclusively by an individual or shared within a limited geographical area. Instead, graphic images of sexual assault and live-rape video generated in one state can be viewed immediately nationwide. U.S. Dep't of Justice, *The National Strategy for Child Exploitation Prevention and Interdiction: A Report To Congress* (Aug. 2010) http://www.justice.gov/psc/docs/natstrategyreport.pdf (last visited Nov. 1, 2013) (*Strategy Report*). The Internet has thus increased production and distribution of child pornography and is "utilized extensively by pornographers to help avoid being caught." *Strategy Report* at 23.

Although it is impossible to quantify the number of images available, state and federal investigators have seen a rapid rise in cases involving child pornography. In 2004, there were 624 cases prosecuted of possession, distribution, receipt, and transportation of child pornography. By 2012, the number of cases had increased to 2,014. U.S. Sentencing Comm'n, *2012 Sourcebook of Federal Sentencing Statistics*, http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/sbtoc12.htm (see Table 11) (last visited Nov. 1, 2013).

The term "child pornography" fails to adequately describe the extraordinarily heinous nature of the acts depicted. *Strategy Report* at 8. Child pornography involves depiction of criminal acts, and most of the images are homemade and record the image producer's ongoing sexual assault of a family member or neighbor. *Crimes of the Internet* 51 (Frank Schmalleger & Michael Pittaro eds., 2009).

The Internet has made it cheaper and easier to anonymously access and share child pornography. Although some of the images are marketed by criminal organizations, a significant amount of the images are traded by non-commercial networks of individuals who share a sexual interest in child abuse. *Strategy Report* at 25-26. Members trade images across state lines and internationally by contributing to group discussions, posting photographs, and transmitting live video during the sexual abuse of a child. *Strategy Report* at 23. These online communities promote communication between pedophiles by "normalizing their interest in children and desensitizing them to the physical and

psychological damages inflicted" on their victims. U.S. Dep't of Justice, *Child Exploitation & Obscenity Section*, http://www.justice.gov/criminal/ceos/subjectareas/childporn.html (last visited Nov. 1, 2013). In this way, defendants accessing the pictures independently cause an indivisible harm to the victim portrayed.

Network members are not simply passive viewers of the images. Rather, they are participants in the abuse, driving the demand for fresh material. To gain entry into a network, potential members often are required to demonstrate a genuine interest in sexual contact with minors by transmitting new child pornography images to the group. *Strategy Report* at 26. Once in the network, posting new images allows members to climb in the group hierarchy. U.S. Sentencing Comm'n, *Report to the Congress: Federal Child Pornography Offenses* 96 (Dec. 2012), http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Sex_Offense_Topics/201212_Federal_Child_Pornography_Offenses/ (last visited Nov. 1, 2013).

To lure new victims and create images to share with the network, pedophiles use child pornography to "groom" new prey. The images are shown to children in an effort "to desensitize them to a degree that the child feels everyone is doing these things, and there is nothing wrong with taking these kinds of sexually graphic pictures." *Crimes of the Internet* 34 (Frank Schmalleger & Michael Pittaro eds., 2009) (*Crimes*).

Easy access and repeated exposure to child pornography desensitizes the viewers, creating a desire for depictions of younger children and greater

levels of violence. *Crimes* at 54. "[T]he younger the victim and the more bizarre the sexual act is, the higher the value of the image is for exchange in the network." *Crimes* at 54.

Emerging trends reveal that images of sadistic abuse of younger children, including toddlers and infants, are increasingly being produced. U.S. Dep't of Justice, *Child Exploitation & Obscenity Section*, http://www.justice.gov/criminal/ceos/subjectareas/childporn.html (last visited Nov. 1, 2013). In 2005, eighty percent of the child pornography possessors arrested were found to have graphic pictures showing sexual penetration of a child, including oral sex. National Center For Missing & Exploited Children, *Child-Pornography Possessors Arrested in Internet-Related Crimes: Findings From the National Juvenile Online Victimization Study* 4-5 (2005), http://www.missingkids.com/en_US/publications/NC144.pdf (last visited Nov. 1, 2013). Eighty-three percent of those arrested had pictures of children between the ages of six and twelve, thirty-nine percent had images of three- to five-year-old children, and nineteen percent had images of toddlers and infants younger than three years. *Id.*

States are devoting many resources to combatting child pornography and the sexual trafficking of minors. But the Internet has changed the nature of the problem. Because the images are rapidly distributed throughout the nation, it is essential that federal law ensure a realistic means of restitution for victims.

B. Allowing Full Recovery Will Provide Victims With Incentive To Come Forward

As the ease of Internet access to child pornography increases the demand for new and increasingly sadistic images of abuse, the number of State victims in need of restitution is rapidly increasing. Although federal law requires courts to order restitution for victims, such an order is impossible when the victim's identity is unknown. 18 U.S.C. § 2259(b)(2), (4). The U.S. Department of Justice estimates that there are over five million unique child pornography images on the internet. U.S. Sentencing Comm'n, *Report to the Congress: Federal Child Pornography Offenses* 96 (Dec. 2012), http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Sex_Offense_Topics/201212_Federal_Child_Pornography_Offenses/ (last visited Nov. 1, 2013). Yet just 4,103 of the individuals portrayed have been identified. *Id.*

Forcing victims to participate in numerous cases throughout the country would benefit creators of child pornography by deterring victims from seeking restitution. Knowledge that the images of their rape and molestation will be perpetually available for others to view on the internet causes victims to "suffer from feelings of helplessness, fear, humiliation, and lack of control[.]" U.S. Dep't of Justice, *Child Exploitation & Obscenity Section*, http://www.justice.gov/criminal/ceos/subjectareas/childporn.html (last visited Nov. 1, 2013). When courts deny full restitution, and instead attempt to determine the percent of the victim's harm caused by each defendant, it creates a need for the victim to repeatedly revisit memories of rape and sexual

abuse, and recount the humiliation and psychological torment caused by knowing images of the crimes are being viewed for sexual gratification.

In measuring the mental and physical cost of participating in multiple cases against the economic benefit of a modest partial recovery of damages, victims may well determine that the potential gain is grossly insufficient to overcome the negative impacts. As the Seventh Circuit found, requiring victims of abuse to participate in actions across the country as they incur treatment costs was not Congress's intent. *United States v. Danser*, 270 F.3d 451, 455 (7th Cir. 2001). If victims were assured that courts would grant restitution for the full amount of their losses, they would likely be more willing to undergo the trauma of coming forward in a single proceeding.

Giving full effect to 18 U.S.C. § 2259 will assist the States by ensuring that the growing numbers of victims are willing and able to fully recover the costs and economic losses caused by child pornography.

CONCLUSION

The Court should enforce the plain language of 18 U.S.C. § 2259 and allow full recovery for victims of child pornography.

RESPECTFULLY SUBMITTED.

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AMICUS CURIAE BRIEF

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In The
Supreme Court of the United States

DOYLE RANDALL PAROLINE,

Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF AMICI CURIAE WOMEN'S AND CHILDREN'S ADVOCACY PROJECT AND JUSTICE FOR CHILDREN IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

What, if any, causal relationship or nexus between the defendant's conduct and the victim's harm or damages must the government or the victim establish in order to recover restitution under 18 U.S.C. Sec. 2259?

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INTEREST OF AMICI CURIAE

The Women's and Children's Advocacy Project (WCAP) at New England Law | Boston is a project of the school's Center for Law and Social Responsibility (CLSR). The WCAP produces the Sexual Violence Legal News (SVLN) project and the Judicial Language Project and provides pro bono advocacy services, including the preparation and submission of amicus briefs, on a variety of legal matters related to violence against women and children.

The issues before this Court in the instant case are of great concern to victimized women and children. This brief is offered to provide this Court with relevant research and policy-based arguments to influence this Court's decision-making process in a manner consistent with the best interests of victimized women and children whose lives are affected by child pornography crimes.[1]

Justice for Children ("JFC") is a national child advocacy organization headquartered in Houston, Texas. Formed in 1987, JFC advocates for the interests of abused and neglected children in the child welfare, family court, and/or criminal justice systems. JFC has an interest in ensuring that governmental entities and individuals are held accountable for intentionally or negligently allowing criminal child abuse to occur and works for changes

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[1] No party or counsel for a party authored this brief in whole or in part. No one other than amici or counsel for amici made any monetary contribution to fund the preparation or submission of this brief.

in the law to protect the rights and safety of children.

Amici adopt and incorporate by reference the Statement of the Case as set forth in Respondents' Brief.

SUMMARY OF ARGUMENT

Restitution is appropriate irrespective of individualized proof of proximate causation because all possessors of child pornography cause harm to all victims by creating and fueling the demand that produces the market that requires supply, and so on. The cyclical nature of the industry's supply and demand process makes precise judicial assessments of individualized causation of harm virtually impossible. Furthermore, requiring individualized proof of proximate causation will lead to unfair results and inadequate compensation for injured victims.

Restitution should be assessed under a joint and several liability theory because the crime causes indivisible injuries. It is not a particular possessor's act of possession, alone, that causes harm, it is also the victim's knowledge that there is an unlimited supply of unknown possessors. Holding each possessor fully responsible increases the likelihood that victims will be compensated while ensuring that possessors are made to appreciate that their actions hurt real victims.

Finally, there should be no requirement that victims be specifically apprised of the identities of

each individual possessor as a precondition to restitution. The detrimental effect of child pornography, though often misunderstood as inconsequential because of its inchoate nature, violates the most fundamental notions of what it means to be a free human being with authority over the intimate self. Unwanted invasions of the self, especially when accompanied by knowledge that images of those invasions will be perpetuated by incessant dissemination, harm victims in their very humanity. While being apprised of a particular offender's identity could cause a victim to endure even more suffering, a victim's primary harm is unrelated to her knowledge of who the possessor is or what his intentions are with regard to the victim's images. Thus, requiring a victim to prove that she knows the identity of a particular possessor would undermine Congress's purpose in enacting the Crime Victim's Rights Act, which was intended to provide restitution to all injured victims, not just those with particularized awareness of offenders' identities. Allowing restitution without requiring notice of offender identity is reasonable and consistent with long-standing precedent that recognizes children depicted in child pornography as "victims" irrespective of whether they ever become personally aware of any particular user's identity.

ARGUMENT

I. RESTITUTION FOR POSSESSION OF CHILD PORNOGRAPHY CRIMES SHOULD BE ACCORDED VICTIMS DEPICTED IN THE MATERIAL IRRESPECTIVE OF INDIVIDUALIZED PROOF OF PROXIMATE CAUSATION, AND SUBJECT TO JOINT AND SEVERAL LIABILITY.

A. Restitution is appropriate irrespective of individualized proof of proximate causation.

It is axiomatic that one cannot commit the crime of possession of child pornography unless child pornography has been produced, which, in turn, requires the hands-on sexual victimization of children. Thus, all possessors of child pornography cause harm to all children depicted in the material by creating and fueling the demand that produces the market. Jennifer Rothman, Note, *Getting What They Are Owed: Restitution for Victims of Child Pornography*, 17 Cardozo J.L. & Gender 333, 349 (2011).

The market for child pornography is enormous, producing an estimated 21 billion dollars annually. *Deleting Commercial Pornography Websites from The Internet: The U.S. Financial Industry's Efforts to Combat the Problem: Hearing Before the Subcommittee on Oversight and Investigations of the H. Comm. on Energy and Commerce*, 109th Cong. 86 (2006) (statement of Hon.

Stupak) ("Child pornography is estimated to be $21 billion [annually].") *See also* Adam D. Lewis, *Dollars and Sense: Restitution Orders for Possession of Child Pornography Under 18 U.S.C. § 2259*, 37 New Eng. J. on Crim. & Civ. Confinement 413, 415 (2011) (child pornography is a "multi-billion" dollar a-year industry). Not all demand is driven by monetary gain, however, because many users participate in the distribution of child pornography for personal use. U.S. Sentencing Comm'n, Report to the Congress: Federal Child Pornography Offenses 98 (2012). The Internet has exacerbated the problem and expanded the market for the trading as well as the selling of images. *Id.* at 94. On-line communities use technology to view and share images, *id.*, and they utilize very sophisticated methods to evade detection such as imposing on members the requirement of producing new images as a "payment" for continued access. *Id.* at 94-96, 99. Some reports put the "price" of access at ten-thousand new images and note that members often exploit their own children as the source of new material. Max Taylor & Ethel Quayle, *Child Pornography: An Internet Crime* 161 (2003). One study found that parents of victims are the most common creators of child pornography. Michelle K. Collins, *Child Pornography: A Closer Look*, The Police Chief (Mar. 2007), http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display&article_id=1139&issue_id=32007 (parents of victims comprised 35% of creators in cases where victims had been identified by law enforcement).

Technology has made child pornography more accessible and more difficult to police than ever before, as well as more prevalent with at least five

million images available on the Internet at any given time. Federal Child Pornography Offenses, *supra*, at 107; P. Jenkins, *Beyond Tolerance: Child Pornography on the Internet* 3 (2001 NYU Press). While viewing child pornography does not necessarily cause people to become sexual offenders, "there exists a complex and reciprocal interaction" between possession and action. Michael L. Bourke & Andres E. Hernandez, *The 'Butner Study' Redux: A Report of the Incidence of Hands-on Child Victimization By Child Pornography Offenders*, 24 J. Fam. Viol. 183, 189 (2009). The well-known *Butner Study* demonstrated this correlation when it found that 62 sexual offenders who possessed child pornography confessed to committing over 1,379 sexual crimes. Bourke and Hernandez, *supra*, at 185. Other studies produced similar results. *See, e.g.*, J. Wolak et al, *Child-Pornography Possessors Arrested in Internet-Related Crimes: Findings From the National Juvenile Online Victimization Study* 16 (2005) (55% of persons arrested for possession of child pornography had been convicted of actual or attempted sexual assault of a child.)

Related research shows that the relationship between possession and action may be explained by the theory that viewers of child pornography "develop distorted attitudes about the sexuality of children" which may subsequently lead to sexual contact with children. Martin C. Calder, *The Internet: Potential, Problems, and Pathways to Hands-on Sexual Offending in Child Sexual Abuse & The Internet: Tackling The New Frontier* 2 (Martin C. Calder ed., 2004); Ethel Quayle & Max Taylor, *Child Pornography and the Internet: Perpetuating a*

Cycle of Abuse, 23 Deviant Behav. 331, 335 (2002). Some offenders may become confused as to the appropriateness of children as sexual partners. Caoilte Ó Ciardha, *A Theoretical Framework for Understanding Deviant Sexual Interest and Cognitive Distortions as Overlapping Constructs Contributing to Sexual Offending Against Children*, 16 Aggression & Violent Behav. 493, 494–500 (2011).

In addition to viewing children as appropriate sexual partners, offenders use the normative power of child pornography to justify their actions;

> One such rhetorical tactic is a denial of the victim, or rather a denial of victimization: children are commonly assumed to have consented to the actions or directly to have sought sex, so the experience is consensual. Even if the child is three or five, she was still asking for it. Linked to this is the denial of injury, since the sexual activity is seen as rewarding and even educational for the child, rather than selfish or exploitive.

Jenkins, *supra*, at 117. Alternatively, they may confess to the crime of possession, and claim that their possession was merely driven by curiosity. Bourke & Hernandez, *supra*, at 189. In reality, possessors of child pornography are commonly sexually aroused by children and often act on those feelings. *Id.*

Among the most frequently viewed and traded images are those depicting especially violent activities such as children being forced to endure sexual abuse involving themselves, other children, adults and even animals. Federal Child Pornography Offenses, *supra*, at 90. Some children even appear compliant or smiling, which is far from the true reflection of their suffering, *Id.* at 109-10, and often the result of drugs used to sedate and incapacitate victims into submission. *Id.* Images of seemingly compliant children are desirable for producers and users because they facilitate the "grooming process," and make the behavior appear "normal" so that children are less resistant. *Id.* The images are also used as a guide to "teach" children how to act. Quayle & Taylor, *supra*, at 340. Amy's abuse followed this pattern—her uncle showed her pornographic movies and told her that he loved her. He then escalated his actions to sexual abuse and attempted to insert his penis into Amy's vagina, despite the pain it was causing Amy, while he took photographs. Joint Appendix, at 59.

A significant portion of child pornography images constitutes "hard core" material involving extreme acts of cruelty, and is created by "the worst of the breed, because [the images] depict ongoing acts of rape and molestation by culprits who are still active and presumably still exploiting victims." Jenkins, *supra*, at 82. In a recent Massachusetts case, for example, a man was charged with sexually abusing and making pornography with toddlers and babies as young as eight days-old. Brian Ballou, *List of Charges Against Sex Offender Grows*, Boston Globe (May 2, 2013).

To satisfy users' demand for new and different material, child pornography must be constantly changing and depicting increasingly graphic and more violent images. Jenkins, *supra*, at 4. In Amy's case, after being abused by her uncle, she was forced to respond to demand for more material and was made "to perform sex acts telephonically and over the computer, soliciting friends for sexual acts, and planned meetings with other potential abusers." Joint Appendix, at 70. One admitted child pornography user explained his need for variety: "...we get bored after a while with the usual and we risk a bit to get new stuff or get actual experience. It's a natural progression. Like stealing. You start small. Get bored. Go for bigger stuff." Jenkins, *supra*, at 109. This insatiable demand for new material necessarily leads to the constant abuse of children in society. *See id.* Even if the industry did not produce a constant demand for new product, studies show that possessors are highly likely to be direct abusers of children. *See* A. Hernandez, *Self-Reported Contact Sexual Offenses by Participants in the Federal Bureau of Prisons' Sex Offender Treatment Program: Implications for Internet Sex Offenders*, Federal Bureau of Prisons, November 2000.

The sexual abuse of children without the involvement of pornography causes substantial harm, but the harm is exacerbated exponentially by the creation of "a permanent record[ing] of the children's participation and the .... circulation..." of that record forever. *New York v. Ferber*, 458 U.S. 747, 759 (1982). In a very real sense, the crime of child pornography possession never ends because

there is simply no way for a victim to move on, put the harm behind her, and obtain closure. *See* Ulrich Schoettle, *Child Exploitation: A Study of Child Pornography*, 19 J. Am. Acad. Child Psychiatry 289, 292 (1980). Thus, because the crime is both relentless and profoundly harmful to society's most defenseless members, restitution should be generously awarded because reducing the profitability of the crime will reduce children's suffering. Rothman, *supra*, at 342. By reducing profit margins, some suppliers will leave the market, which will reduce the industry's incentives to create new product. Rothman, *supra*, at 339; *Child Sexual Abuse: What Parents Should Know*, American Psychological Association, https://www.apa.org/pi/families/ resources/child-sexual-abuse.aspx (last visited Oct. 8, 2013).

B. Restitution should be assessed under a joint and several liability theory.

Restitution should be assessed under a joint and several liability theory because the crime causes indivisible injuries. Vicky's Brief in Defense of the Judgment Below at 31; *United States v. Burgess*, 684 F.3d 445 (4th Cir. 2012) (No. 09-4584), 2012 WL 554002. As Amy explained, it is not her awareness of the fact that there are many unknown possessors out there. She lives "in constant fear that someone will see [her] pictures and recognize [her] and that [she] will be humiliated all over again." Joint Appendix, at 60. Amy has explained that this has had a profound affect on every aspect of her life: "I had to quit a job I had as a waitress because there was a guy who I

thought was always staring at me. I couldn't stop thinking, did he recognize me? Did he see my pictures somewhere? I was simply too uncomfortable to keep working there." Joint Appendix, at 63.

The damage caused by possession of child pornography results in a collective injury that should be subjected to restitution subject to the civil law standard[2] of joint and several liability because it is impossible for a court to assign a more precise damage assessment to each individual defendant. Dennis F. DiBari, Note, *Restoring Restitution: The Role of Proximate Causation in Child Pornography*

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[2] In a case currently before this Court, *Burrage v. United States*, No. 12-7515, the state criminal defendant, Petitioner there, pointed out a key difference between civil and criminal cases and noted that "[i]n the civil context . . . the courts are more concerned about restitution to the injured plaintiff, rather than imposing criminal penalties . . ." Reply Br. of Petitioner at 6. By extension, he makes the point that restitution decisions made in the aftermath of criminal convictions are akin to civil matters, thus properly can be assessed under civil law standards. Petitioner's point in *Burrage* that civil law standards are inapplicable in that case rests on the proposition that that case involved a question of whether a criminal defendant, convicted on distribution of a controlled substance charge, should face a mandatory minimum of twenty years incarceration when "death or serious bodily injury results from the use of such substance." Reply Br. of Petitioner at 15, n.5. Burrage reasonably notes that without proof that the drug proximately caused such "death or serious bodily injury," the jury's function in determining guilt on the enhanced charge is nullified as every death that occurs from the ingestion of a distributed substance would automatically require imposition of the mandatory minimum term. *Id.* Here, unlike in *Burrage*, the issue involves restitution for an injured crime victim; an issue unrelated to proof of the charges or punishment for the crime itself, and a determination of which requires no involvement of a jury.

Possession Cases Where Restitution Is Sought, 33 Cardozo L. Rev. 297, 322 (2011). Indeed, applying an apportionment theory based on proof of individualized proximate causation, as urged by Paroline, was described as unworkable in a recent dissenting opinion from the Fourth Circuit. *United States v. Burgess*, 684 F.3d 445, 461 (4th Cir. 2012) Gregory, J., concurring in the judgment, dissenting in part, and noting: "I do not believe that a fact finder could meaningfully say precisely *x* amount of Vicky's psychological injuries were caused by Burgess's watching the video, that *y* amount was caused by Defendant # 2's watching the same video, and so on." In an analogous California case, the court ordered each defendant in a criminal case involving manufacturing of a controlled substance to pay penalties for the cost of removal of the hazardous substance jointly and severally because such distribution of the financial burden is a more efficient use of resources and prevents duplication of court proceedings. *People v. Madrana*, 55 Cal. App. 4th 1044, 1049-52 (Cal. Ct. App. 1997). The *Madrana* court rejected the defendants' argument that the extent of their individual financial responsibility should be assessed on an individual basis in accordance in each offender's culpability, noting that such a requirement would thwart the legislative purpose, and likely cause the victims to receive only partial restitution for the harm endured. *Id., at 1050.* The court concluded that joint and several liability increases the likelihood that victims will be compensated for their suffering and "causes the criminal to understand his actions have harmed a real victim. . . ." *Id.* The court also noted the accused's due process rights were protected because

each defendant had notice and an opportunity to be heard to address liability and the effect of contributions by other responsible defendants, thus lessening the chance of "double recovery by a victim." *Id.*

In *Madrana*, as here, joint and several liability theory makes sense because child pornography is the product of indivisible group activity and, as in *Madrana*, holding each possessor fully responsible increases the likelihood that victims will be compensated while those who possess child pornography are made to appreciate that their actions caused harm to real victims. Likewise, restitution hearings afford defendants ample due process rights to address liability and the effect of contributions by other responsible defendants.

The crime of child pornography is not unlike the crime of gang rape, which is governed by a restitution statute almost identical to that of possession of child pornography. *See* 18 U.S.C. § 2248 (2006). If restitution for victims of gang rape were subjected to apportionment theory, a judge would be obligated to undertake the impossible task of assessing restitution based on the idea that each perpetrator caused only a certain percentage of the victim's harm. Such an approach would not be feasible in terms of reliable measurements of harm, nor would it be fair to the victim or consistent with Congress' express mandate that restitution be granted for "the full amount of the victim's losses." 18 U.S.C. §§ 2248, 2259 (2006). Furthermore, each rapist's share of the harm would be inversely proportional to the number of rapists involved. In

other words, gang rapists would effectively get a volume discount. Such a result would be morally unacceptable and dangerous to public safety, especially considering that gang rape is a significant social problem. *See, e.g.*, Barnini Chakraborty, *Disabled Ga. Girl Gang Raped*, ABCNews (Nov. 2, 2013), http://abcnews.go.com/US/story?id=95129; Tiffany Craig, *Cleveland Police Investigate Reported Gang Rape of Teen Girl*, KHOU.com (Oct. 2, 2013), http://www.khou.com/news/crime/Cleveland-police-investigate-reported-gang-rape-of-teen-girl—226225281.html; David Chang, Dan Stamm, and AP, *2 Boys Rape 2 Women in Park: Police*, NBC Washington (Sept. 4, 2013), http://www.nbcwashington.com/news/national-international/Gang-Rape-Boys-Wilmington-221813231.html; Lloyd Vogelman & Sharon Lewis, *Gang Rape and the Culture of Violence in South Africa*, CVRS.org, http://www.csvr.org.za/index.php/publications/1631-gang-rape-and-the-culture-of-violence-in-south-africa.html (last visited Nov. 10, 2013). Although not the most common form of rape, some studies estimate that twenty-five percent of all rapes are gang rapes. Chang and Stamm, *supra*. Disturbingly, gang rape is often seen as socially acceptable because of the group mentality involved. Kimberly M. Trebon, Note, *There Is No "I" In Team: The Commission of Group Sexual Assault by Collegiate and Professional Athletes*, 4 DePaul J. Sports L. & Contemp. Probs. 65, 66 (2007).

II. AMY'S KNOWLEDGE THAT UNIDENTIFIED CONSUMERS OF CHILD PORNOGRAPHY ARE VIEWING HER NAKED AND ABUSED BODY IS SUFFICIENT TO WARRANT RESTITUTION WITHOUT PROOF THAT AMY KNOWS THE IDENTITIES OF SPECIFIC POSSESSORS.

The detrimental effect of child pornography on its victims is well recognized. *See* S. REP. NO. 95-438, at 5 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5, 42. As early as 1980, psychological studies have shown that victims suffer tremendous psychological and emotional harm. Ulrich Schoettle, *Child Exploitation: A Study of Child Pornography*, 19 J. Am. Acad. Child Psychiatry 289, 296-97 (1980). Specific injuries can occur immediately and last for years and include: low self esteem driven by guilt, shame, and embarrassment, generalized fear, irritability, panic/anxiety attacks, nightmares or sleep disorders, depression, suicidal thoughts, dissociation, loss of memory, inability to concentrate, academic problems, body image problems, and post-traumatic stress. *Fact Sheet: Child Sexual Abuse in Custody Disputes*, Child Abuse Solutions, Inc., http://www.childabusesolutions.com/page_07.html (last visited Sept. 30, 2013). Behavioral harms include: withdrawal, behavior regression, aggressive behavior, defensive avoidance, sleepwalking, loss of control over bowels, difficulty forming or maintaining healthy relationships, age-inappropriate sexual behavior, substance abuse, and eating disorders. *Id.* Physical harms include: genital injuries or trauma, sexually transmitted diseases,

bleeding, infections, bladder dysfunction, irritable bowel syndrome, abdominal pain, penile/urethral inflammation, and sexual dysfunction. *Id.*

Victims are usually able to cope with the harm with the help of psychotherapy, but the very existence of images that will exist for eternity has a crippling affect on victims' psyche. *Hardy, supra,* at 600. "Because the child's actions are reduced to a recording, the photography may haunt him in future years, long after the original misdeed took place. A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography." David P. Shouvlin, Note, *Preventing the Sexual Exploitation of Children: A Model Act,* 17 Wake Forest L. Rev. 535, 545 (1981). In one case involving Amy and her images in the widely circulated "Misty Series," the District Court for the Western District of Pennsylvania acknowledged:

> Amy now lives every day in fear that she will be recognized because of her images, and the knowledge that her images are being continually viewed has made her feel continually victimized since her discovery. She reports difficulty functioning on a day to day basis, plagued by flashbacks, nightmares, and an inability to focus. Amy cannot drive, has dropped out of school, lives with her parents, and has at times resorted to substance abuse to cope with her memories.

Id. Even though Amy has been in therapy, she still feels "dirty" and lives in fear that others will discover her pictures. She dreads the day when friends discover her secret and "fears the unknown and unnamed people who continued to be looking at these pictures of her for their own perverse interests or to 'groom' other children into these acts. She feels continually violated when she contemplates these possibilities." Joint Appendix, at 74-75.

While the sexual abuse itself is harmful in a number of ways, images of the abuse have an insidious impact on victims' lives because of their awareness that the abuse has been recorded and is being shared among strangers in a manner than cannot be controlled and will likely grow exponentially as distribution networks expand. *Shouvlin*, *supra*, at 545; *Schoettle*, *supra*, at 292. This has had a profound affect on every aspect of Amy's life including how she feels about her very existence: "I am humiliated and ashamed that there are pictures of me doing horrible things with my uncle. Everywhere I go I feel judged. Am I the kind of person who does this? Is there something wrong with me? Is there something sickening and disgusting about who I am?" Joint Appendix, at 62. Amy's sentiments reflect those of other victims who feel inextricably tied to their abusive past *because* the images are out there. *Id.* at 63.

Injury from depiction is often misunderstood as inconsequential because of its inchoate nature, however, harm to the individual via the constant awareness that images of one's sexually abused body are being disseminated violates the most

fundamental ideas of what it means to be a free human being with authority over the intimate self. Charles Fried, *Privacy*, 77 Yale L.J., 475, 489 (1967-68). Professor Fried notes that fundamental liberty includes protection from unwanted invasions of privacy, and "is not simply an absence of information about us in the minds of others; rather it is the control we have over information about ourselves. . . ." *Id.* at 484. The loss of control over who has access to intimate information about ourselves is "the ultimate assault on liberty," *id.*, and is "profoundly humiliating." *Id.* at 485. Indeed, "invasions of privacy injure us in our very humanity." *Id.* at 486.

The Restatement (Second) of Torts § 652B on privacy violations likewise reflects concern for the loss of control over the intimate self: "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." A similar sentiment was expressed by a California judge presiding over an invasion of privacy case involving the dissemination of photographs taken by police at the scene of an accident depicting a young woman who had been decapitated. *Catsouras v. Dep't of Cal. Highway Patrol*, 104 Cal. Rptr.3d 352, 359 (Cal. Ct. App. 2010). The photographs were distributed by police officers to friends and family and later published on over 2,500 websites. *Id.* The court ruled that this activity constituted an actionable invasion of privacy, *id.* at 366, and a concurring opinion described it as a valid claim for the tort of "intrusion

upon seclusion." *Id.* at 902. The distribution of images of a child's sexually abused body similarly intrudes upon the seclusion of the depicted child. Privacy tort actions are allowed even where such photographs have been collected but have not yet been publicized. Restatement (Second) of Torts § 652B cmt. b (1965). In a notable Minnesota case, a valid intrusion upon seclusion claim was made when a woman attempted to develop nude shower photographs at a Wal-Mart and the developer kept the photographs for personal use but told the woman that he could not develop them because of their nature. There was no distribution beyond the developer but he was subject to suit nonetheless because he intruded upon the plaintiff's fundamental interest in "seclusion," privacy and personal autonomy. *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 232 (Minn. 1998). Although there was no express ruling on the merits, the court poignantly noted that "[o]ne's naked body is a very private part of one's person and generally known to others only by choice. This is a type of privacy interest worthy of protection." *Id.* at 235.

The possession of child pornography is similarly a violation of the depicted victim's autonomy, privacy, self-determination and humanity, irrespective of whether the individual victim is aware of the precise moment when an intrusion occurs. Indeed, an image of a sexually abused child is worthy of even greater protection because children have less capacity and opportunity to protect themselves or even to understand the nature of pornography, or control the circumstances under which such material is produced and

disclosed. As Amy stated in her Victim Impact statement:

> Every day of my life I live in constant fear that someone will see my pictures and recognize me and that I will be humiliated all over again. It hurts me to know someone is looking at them—at me—when I was just a little girl being abused for the camera. I did not choose to be there, but now I am there forever in pictures that people are using to do sick things. I want it all erased. I want it all stopped. But I am powerless to stop it just like I was powerless to stop my uncle.

Joint Appendix, at 60.

Amy suffers chronically from the thought that the images of her abused body will probably never completely disappear and they may be used to "groom" other children to submit to similar acts. *Id.* at 57-58. This emotional pain renders her "unable to do the simple things that other teenagers handle easily." *Id.* at 61. For example, she has been unable to get her driver's license, she has been unable to retain a job, and she was forced to drop out of college because she stopped attending class after seeing a video about child abuse in her psychology class. *Id.* Amy feels as though she is being forced to live a double life because she is harboring the secret of past abuse, as her identity has largely remained anonymous. *Id.* at 65. Amy feels it is only a matter of time until her secret is revealed—"It's like my life is

on hold for that day and I am frozen in time waiting. I know those disgusting pictures of me are stuck in time and are there forever for everyone to see." *Id.* at 62.

Amy suffers because of the constancy of intrusions and threatened intrusions and while being apprised of a particular offender's identity could add to Amy's suffering, the baseline harm occurs irrespective of who the possessor is, or what his intentions or motivations are with regard to the images in his possession. Requiring Amy to prove that she knows the identity of a particular possessor would undermine Congress's purpose in enacting the Crime Victim's Rights Act (CVRA), which was intended to provide restitution for all injured victims, not just those who could prove that a specific individual committed engaged in a particular act at a given time. *United States v. Danser*, 270 F.3d 451, 455 (7th Cir. 2001). Such a knowledge requirement would effectively preclude restitution in criminal cases involving mentally retarded crime victims who, because of a disability, may never fully understand whether a crime happened, much less who committed it. Furthermore, a knowledge requirement would traumatize victims by requiring that they be told specific details about the identity of each user who was looking at their images at a given time. The CVRA nowhere suggests that victims endure such harm as a prerequisite to restitution, or that restitution be denied in cases where victims cannot personally identify their perpetrators.

In any event, the record reflects that Amy was kept generally informed of the situation regarding the nature of child pornography, and the distribution of her images in particular. Joint Appendix at 72-78; Transcript of Oral Argument at 22-23; *see also*, *In re Amy Unknown*, 701 F.3d 749 (2012). Victims who have already suffered terribly should have the right to choose not to be notified of the specific identities of individual possessors as this would force victims to choose between requesting desperately needed restitution and enduring potentially significant amounts of new harm given that victims of child pornography are often involved in hundreds or thousands of cases at the same time. Federal Child Pornography Offenses, *supra*, at 116-17. Allowing restitution without such notification is reasonable and consistent with precedent that has long recognized children depicted in pornography as "victims" irrespective of whether they are personally aware of any particular possessor's identity. *New York v. Ferber*, 458 U.S. 747 (1982); *U.S. v. Kearney*, 672 F.3d 81 (1st Cir. 2012); *U.S. v. Aumais*, 656 F.3d 147 (2d Cir. 2011); *U.S. v. Kennedy*, 643 F.3d 1251 (9th Cir. 2011); *U.S. v. McDaniel*, 631 F.3d 1204 (11th Cir. 2011); *U.S. v. Fast*, 820 F. Supp. 2d 1008 (D. Neb. 2011); *U.S. v. Lundquist*, 847 F. Supp. 2d 364 (N.D. N.Y. 2011); *U.S. v. Klein*, 829 F. Supp. 2d 597 (S.D. Ohio 2011); *U.S. v. Hardy*, 707 F. Supp. 2d 597 (W.D. Pa. 2010); *U.S. v. Church*, 701 F. Supp. 2d 814 (W.D. Va. 2010).

> Child pornography fosters the exploitation of innocent and vulnerable children all over the world. It causes irreparable harm to some of the

> weakest members of our society. Child pornography is a permanent photographic record of the victim's sexual abuse, and the distribution and circulation of the pornographic images forever exacerbates the harm to these child victims.

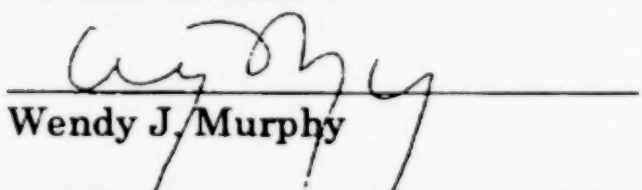
Joint Appendix, at 278.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Fifth Circuit Court of Appeals.

Respectfully submitted,

Counsel for amici



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